Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

LAWRENCE TYLER,
Petitioner,

v.

JAMES H. DOUGLAS, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the Second Circuit United States Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a court purporting to apply the "plain meaning" rule of statutory construction properly give effect to the will of Congress when its construction:

(a) assumes "clear and unambiguous" language where other courts have discerned ambiguity;

(b) partially repeals a statute by implication—thus destroying the valuable vested statutory rights of millions of Americans—where there is no reference in the text or legislative history of the latter enactment to the statute purportedly repealed, the rights embodied therein, or its former beneficiaries;

(c) rejects a plain interpretation that gives effect to both the earlier and later statutes, thus ignoring the cardinal obligation to harmonize statutes whenever possible;

(d) ignores the statutory context that confirms a more plausible legislative intent;

(e) renders all but the last sentence of the latter enactment superfluous;

(f) finds an implied repeal in an emergency appropriations rider—even though both houses of Congress forbid such substantive change of law in appropriations measures; and

(g) effects a massive taking of property without just compensation, though Congress never contemplated such a result, which raises serious constitutional problems that can easily be avoided with a harmonizing interpretation?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner Lawrence Tyler, on behalf of himself and all others similarly situated, and the following respondents:

1. Defendant James H. Douglas, in his official capacity as escrow agent on behalf of the State of Vermont.

2. Defendant William H. Sorrell, in his official capacity as Attorney General of Vermont.

3. Defendant Eileen Elliot, in her official capacity as Commissioner, Vermont Department of Social Welfare.

4. Defendant Lori Collins, in her official capacity as Third Party Liability Supervisor, Vermont Department of Social Welfare.

5. The States of Nevada, Alabama, Alaska, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maryland, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah and West Virginia filed an *amici curiae* brief in the Second Circuit in support of Respondents.

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OPINIONS BELOW

The unreported decision of the United States District Court for the District of Vermont and the opinion of the Second Circuit United States Court of Appeals, reported at 280 F.3d 116 (2nd Cir. 2001), are set forth in the Appendix at App. 18a and App. 4a, respectively.

BASIS FOR JURISDICTION

The opinion of the Second Circuit United States Court of Appeals was filed on October 16, 2001. The order of the Second Circuit denying the Petition for Rehearing was filed on December 27, 2001. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of the United States Constitution Amendments V and XIV appear in the Appendix at App. 43a. In addition, the relevant portions of the Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 106-31, 113 Stat. 57 (1999) (codified at 42 U.S.C. § 1396b(d)(3)) and of 42 U.S.C. § 1396k appear at App. 48a and 45a, respectively.

STATEMENT OF THE CASE

This case derives from the lawsuits by the fifty states against tobacco companies to recoup the states' Medicaid expenditures. These historic lawsuits ultimately led to an unprecedented settlement in which states stand to collect billions of dollars in perpetuity.

Federal Medicaid law provides that upon actual collection of any Medicaid recovery—for example, upon each future annual payment from tobacco companies—the state and federal governments are fully made whole for their Medicaid expenditures. The balance of the recovery, if any, goes to individual Medicaid recipients such as Petitioner here. 42 U.S.C. § 1396k(b).

This lawsuit is that simple. Yet is has spawned a bizarre jurisprudence. In the several states where Medicaid recipients have sued to enforce supreme federal Medicaid law (including Vermont, the origin of this lawsuit), nearly all courts have decided that Medicaid recipients lose, but their multiple paths to that result often contradict each other and this Court's authoritative direction. While district courts have nearly all dismissed these Medicaid enforcement cases on Eleventh Amendment sovereign immunity grounds, not a single one of the six federal courts of appeal to decide a Medicaid case has agreed. Two circuits expressly disagreed, holding correctly that the Eleventh Amendment did not bar this suit for prospective enforcement of supreme federal law. The other four circuits elected to bypass the Eleventh Amendment question and affirmed on different grounds.

Three federal courts of appeal—the First, Second, and Tenth Circuits—decided the case based upon an emergency appropriations rider enacted in 1999, in which Congress waived the federal share of the states' historic Medicaid recovery. *See* Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 106-31, 113 Stat. 57, 103-04 (1999), codified at 42 U.S.C. § 1396b(d)(3) (App. at 48a). These courts inflated that express waiver of the *federal* share into an implied repeal of *Medicaid recipients'* statutory entitlement to the remainder under 42 U.S.C. § 1396k(b).

This Petition seeks review of this remarkable departure from established canons of statutory construction.

A. The Medicaid Program

"The Medicaid program provides federal funds to States that pay for medical treatment for the poor." *Schweiker v. Gray Panthers*, 453 U.S. 34, 36 (1981). It is "a cooperative federal-state program through which the Federal Government provides financial assistance to the states so that

they may furnish medical care to needy individuals." *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 502 (1990).

"Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX [the Medicaid Act]." *Harris v. McRae*, 448 U.S. 297, 301 (1980); *see also Wilder*, 496 U.S. at 501. Vermont has chosen to participate in the Medicaid program, and by statute commits to administration of its Medicaid program as "required ... under Title XIX of the Social Security Act." 33 V.S.A. § 1901.

Among the provisions of the Medicaid Act, to which Vermont expressly subscribed in exchange for hundreds of millions of dollars of federal assistance, is mandatory recovery, where practicable, of Medicaid expenditures for which third parties are responsible. 42 U.S.C. § 1396a(a)(25). Such a recovery must then be distributed in the following order: (1) to the state, for its Medicaid expenditures; (2) to the federal government, for its contributed expenditures; and (3) to the injured Medicaid recipients on whose behalf the expenditures were made. 42 U.S.C. § 1396k(b) (App. at 46a); *see also* 42 C.F.R. § 433.154 (same); 45 Fed. Reg. 8983 (1980) (HCFA's official commentary). This distribution requirement ensures that both the state and federal government are made whole, with the balance of a recovery, if any, going to the injured party.

B. Vermont's Medicaid Recovery: The Tobacco Settlement

This case arises following Vermont's resolution of its lawsuit against manufacturers of tobacco products, brought in July 1998 by the State of Vermont against the tobacco industry. Prominent in Vermont's lawsuit, as with the tobacco lawsuits of all states, were claims of Medicaid expenditures caused by tobacco products.

The case settled on March 25, 1999 pursuant to a Consent Decree and Final Judgment. Vermont then became eligible to participate in a Master Settlement Agreement ("MSA") crafted by the tobacco industry and the Attorneys General of 46 settling states. In the MSA, the states agreed to "unconditionally release and forever discharge" the tobacco defendants from "any future claims for reimbursement of health care costs allegedly associated with the use of or exposure to Tobacco Products." MSA at 8, 55. In exchange for this release, the states, including Vermont, became eligible to collect from the tobacco defendants future anticipated annual payments in a total amount then estimated at $206 billion. The complaint in this case pleads, and the evidence submitted to the district court confirms, that Vermont's settlement collections will substantially exceed its actual smoking-related Medicaid expenditures, and that Petitioner and others similarly situated are entitled to those excess collections under governing federal law.

Significantly, before these Medicaid enforcement lawsuits, there was no material controversy over the straightforward proposition that the tobacco settlement constituted a Medicaid recovery. Indeed, until the pot got massive, states themselves behaved in conformity to § 1396k(b)'s mandatory distribution scheme. In testimony before Congress, the Deputy Administrator of the Health Care Financing Administration ("HCFA," the federal agency then responsible for administering the Medicaid program), stated:

> Existing Federal law clearly requires States to share all Medicaid recoveries with Federal taxpayers. **Nothing in the law creates an exception for tobacco settlements, regardless of their size.** States routinely report and credit HCFA with the Federal share of third party liability collections. It is worth highlighting that three States—Massachusetts,

> Louisiana, and Florida—reported and credited to HCFA some of their tobacco collections as part of a settlement with the Liggett Corporation. Although the funds involved in the Liggett settlement are much smaller than those at stake in the comprehensive settlement, these initial payments indicate that **the States understand their legal and fiduciary responsibility to credit the Federal government with its share of tobacco settlement proceeds.**

Medicaid and Tobacco Settlements, 1999: Before Subcommittee on Labor, HHS, Education, and Related Agencies of the Senate Comm. on Appropriations, March 15, 1999, (Statement of Mike Hash, Deputy Administrator, Health Care Financing Administration) (emphasis added).

C. This Lawsuit for Prospective Enforcement of 42 U.S.C. § 1396k(b).

Petitioner Lawrence Tyler filed suit on behalf of himself and all others similarly situated in the United States District Court for the District of Vermont on January 26, 2000. Defendants Douglas, Sorrell, Elliot and Collins filed a motion to dismiss under Rule 12(b)(1) on April 10, 2000, claiming that Eleventh Amendment sovereign immunity barred Petitioner's claims. The trial court agreed and granted the motion to dismiss by order dated June 21, 2000.

On October 16, 2001, the Second Circuit affirmed. Tyler filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on November 1, 2001, which the Second Circuit denied by order dated December 27, 2001.

The Second Circuit panel, however, elected to bypass the Eleventh Amendment question. The panel instead decided that Congress' 1999 emergency appropriations rider (App. at 48a)—an amendment to a separate section of the Medicaid Act concerning only calculation of money due the federal

government—implicitly repealed § 1396k(b) and thus *sub silentio* stripped Medicaid recipients of substantial vested rights. Neither the text of the 1999 appropriations rider nor its legislative history makes any reference to § 1396k(b) or to the rights of Medicaid recipients embodied therein.

REASONS FOR GRANTING THE WRIT

This case frames a pure issue of statutory construction with implications for how every judge in every district and appellate court interprets legislation. Petitioner respectfully contends that the error in the Second, Tenth, and First Circuits bespeaks a fundamental misunderstanding of the weight and interrelation of core canons of statutory construction.

The Second Circuit concluded that the final sentence of Congress' 1999 appropriations rider—permitting the states to "use the sums described in clause (i) for any expenditures determined appropriate by the State"—means that the states could spend the *entire* tobacco settlement in any manner they pleased, and that Congress thus not only gifted billions of *federal* dollars to the states but likewise by stealth stripped Medicaid recipients of their vested statutory rights.

Yet the text of the appropriations rider does not say that. Nor could its *context* cue any conclusion other than the opposite one. And the rider's legislative history confirms the error. The members of Congress debated only what to do with the *federal* share of the states' Medicaid recovery. The members of Congress then located their enactment in a section of the Medicaid Act addressing only money to which the *federal government* would have been entitled. And they did so with an emergency appropriations rider—the kind of enactment *least* suited to affect substantive change in law (which is why rules in both houses of Congress forbid it). Never once did any member of Congress ever mention or

even imply any intention to affect Medicaid recipients' rights.

At stake here is not only a massive confiscation of property from the nation's poorest citizens,[1] or merely a mistaken interpretation of a single statute—but the basis upon which the judiciary lays claim to principled and consistent decision-making. The danger in the circuit decisions is an unprecedented departure from the rules that discipline judges in "giving effect to the will of the Legislature." *Osborn v. Bank of the United States*, 22 U.S. (Wheat.) 738, 866 (1824). The published opinions to date—and more Medicaid enforcement cases are currently under consideration—imperil the utility and integrity of the canons of construction. On this record, the core canons of statutory construction have little power to cabin judicial discretion.

Indeed, to the eight well-settled canons of statutory construction set forth in the following Supreme Court cases, the Second Circuit decision below, as well as the decisions from the First and Tenth Circuits, essentially add, "**or not**."

- "[W]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (internal quotations omitted). The two statutory provisions at issue are clearly capable of co-existence—in § 1396k(b), Congress mandated a specific distribution scheme for Medicaid recoveries; in the 1999 appropriations rider, Congress declared that the states

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[1] Medicaid, as "the payor of last resort," requires citizens to spend down their assets to meet eligibility levels. *See* 42 U.S.C. 1396a(a); S.Rep. No. 99-146 at 312, reprinted in 1986 U.S.Code Cong. & Ad.News, vol. 3A, 279 ("Medicaid is intended to be the payor of last resort, that is, other available resources must be used before Medicaid pays.").

were free to use *the federal share* of the tobacco settlement however they wish.

- **"[T]he meaning of statutory language, plain or not, depends on context."** *Bailey v. United States*, 516 U.S. 137, 145 (1995). The statutory context of the 1999 amendment confirms Congress' intent only to waive the federal share of the tobacco settlement, not to affect Medicaid recipients' rights.

- **"[I]t can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change."** *United States v. Fausto*, 484 U.S. 439, 453 (1988). Neither the text nor legislative history of the 1999 appropriations rider even hints at any intention to affect § 1396k(b) or the rights of Medicaid recipients.

- **"[R]epeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest."** *Rodriguez v. United States*, 480 U.S. 522, 524 (1987); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (implied repeals would require "positive repugnancy between the provisions"); *Morton v. Mancari*, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."). Congress did not even hint at intent to repeal § 1396k(b), much less make it clear and manifest or enact a "positive repugnancy."

- **"It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"** *TRW Inc. v. Andrews*, 534 U.S. 19, —,

122 S.Ct. 441, 449 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). The decision below renders superfluous all of the 1999 amendment except the final sentence.

- **The doctrine disfavoring repeals by implication applies "with even *greater* force when the claimed repeal rests solely on an Appropriations Act."** *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978). The 1999 amendment was an emergency appropriations rider—a legislative vehicle that, by rules in both houses of Congress, cannot affect substantive change in law.

- **"Accordingly, the first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively."** *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001) (citing *Martin v. Hadix*, 527 U.S. 343 (1999)). The circuit court's interpretation operates retroactively to strip Medicaid recipients of substantial vested rights, though Congress never hinted at any intention to affect Medicaid recipients *at all*, much less directed such a confiscation with "the requisite clarity."

- **Statutes must be interpreted to avoid not merely unconstitutional results, but "difficult constitutional questions," and where, "an alternative interpretation of the statute" that avoids any constitutional thicket is "fairly possible," courts "are obligated to construe the statute to avoid such problems."** *St. Cyr*, 533 U.S. at 300 & n.13. According to the circuit court's interpretation, Congress retroactively confiscated Medicaid recipients' statutorily vested property interest in the tobacco settlement remainder—which assuredly raises a "difficult constitutional question," despite a

logical and persuasive interpretation that avoids constitutional difficulty.

The "plain meaning" doctrine is a powerful force that disciplines judiciary and legislature alike—but like all rules of statutory construction, its power must be exercised responsibly and always in the service of discerning actual legislative intent. This Court's unanimous disposition yesterday in *Department of Housing and Urban Development v. Rucker*, No. 001770, 001781 (March 26, 2002)—reversing the en banc Ninth Circuit—is illustrative. The en banc Ninth Circuit contrived an inventory of improper canons to subvert plain statutory meaning and clear congressional intent. Here, the Second Circuit ignored numerous well-settled canons of construction to find plain meaning where there is none, and to subvert clear congressional intent. There is manifest error in either approach.

This case provides an ideal complement to the principles forcefully enunciated in *Rucker*. Where *Rucker* illustrates the proper use of the plain meaning doctrine, this case illustrates its misuse.

If, as Petitioner respectfully contends, the Tenth, Second, and First Circuits erred, then the very magnitude of that error, in a case affecting millions of Americans immediately, and countless more in future judicial dispositions, warrants this Court's intervention to correct it. If, as Respondents will contend, the circuit decisions are correct in result, then this Court's explanation of a principled basis for that result can have enormous consequences for how judges and litigants comprehend the tools of statutory construction.

ARGUMENT

I. The Current Medicaid Enforcement Landscape

Numerous district courts and six federal courts of appeal, including the Second Circuit, have decided similar cases on a variety of often contradictory grounds. Decisions to date are nearly all adverse to Medicaid recipients—yet that "momentum" is so fragmented and so fraught with conflict and disagreement that the ease with which most courts have apparently decided the result very much belies the struggle to find a principled basis for that result.

The first—and perhaps most influential—Medicaid enforcement disposition in federal court was *Floyd v. Thompson*, 111 F.Supp.2d 1097 (W.D. Wis. 1999), *aff'd on other grounds*, 227 F.3d 1027 (7th Cir. 2000). The court dismissed the case by declaring that the tobacco settlement proceeds were "fixed" and had already "vested" in the state, rendering the case one for retrospective "damages" and thus barred by the Eleventh Amendment—a conclusion both factually wrong and legally irrelevant to the proper *Ex parte Young* analysis.

While six United States Courts of Appeals have now issued decisions on versions of these Medicaid enforcement actions, not a single one embraced the Wisconsin court's conclusion (including the Seventh Circuit on appeal), and the Tenth Circuit expressly repudiated it. Indeed, not a single federal appellate court has yet held that the Eleventh Amendment bars a Medicaid enforcement action—and two (the Fifth and Tenth Circuits) have correctly held that it does not. But the Wisconsin court's analytical virus spread rapidly through other district courts, and at least **eleven** such courts

reproduced the Wisconsin court's fallacious reasoning in dismissing these cases on Eleventh Amendment grounds.[2]

The first federal appellate court to decide a Medicaid case was the Seventh Circuit in *Floyd v. Thompson*, 227 F.3d 1029 (7th Cir. 2000). Concluding that the Eleventh Amendment questions were "complex" and "not easily answered," *id.* at 1034-35, the Seventh Circuit skipped them and proceeded to the merits. As to Congress' 1999 appropriations rider—now the most common basis for adverse decisions in appellate courts and the basis for this Petition—the Seventh Circuit simply discerned ambiguity: maybe Congress agreed with the states or maybe Congress was just "feeling generous." *Id.* at 1034.

Thus, the Seventh Circuit acknowledged ambiguity in precisely the words that the Second Circuit below deemed "plain" and "clear and unambiguous," App. at 14a—which is to say that the very word "unambiguous" now assumes an ironic ambiguity. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) (questioning characterization of a statutory term as unambiguous when its meaning has generated a division of opinion in the lower courts).

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[2] *See Barton v. Summers*, 111 F.Supp.2d 989, 992 (M.D.Tenn. 2000); *White v. Hunt*, 2000 WL 33261006, *5, No. 00-CV-14 (W.D.N.C. Jul. 12, 2000); *McClendon v. Georgia Dep't of Community Health*, No. 4:00-CV-0026-HLM, slip op. at 17 (N.D.Ga. Aug. 28, 2000); *Downs v. Kentucky*, No. 00-23, slip op. at 7 (E.D.Ky. Aug. 31, 2000); *Martin v. New Mexico*, 197 F.R.D. 694, 696 (D.N.M. 2000); *Strawser v. Lawton*, 126 F.Supp.2d 994, 1003 n.6 (S.D.W.Va. 2001); *Cardenas v. Anzai*, 128 F.Supp.2d 704, 709 (D.Haw. 2001); *Greenless v. Almond*, No. 00-037ML, slip op. at 6 (D.R.I. Feb. 26, 2001); *Rickerts v. Guinn*, No. CV-N-00-0176-HDM, slip op. at 4 (D.Nev. Feb. 27, 2001); *Clark v. Stovall*, 158 F.Supp.2d 1215, 1224 (D.Kan. 2001); *Joseph v. Condon*, No. 6:00-324-24, slip op. at 11 (D.S.C. Mar. 19, 2001).

On narrow grounds of Wisconsin assignment law, the Seventh Circuit held that § 1396k(b) did not come into play because there was not (and, logically extending this holding, never could or ever will be under any circumstances) a "remainder" to which Medicaid recipients could be entitled. If, as the Seventh Circuit found, the "assignment [to the state by Medicaid recipients] corresponds exactly to the amounts the state pays," *id.* at 1037, then 42 U.S.C. § 1396k(b) is a nullity, never triggered, and so much statutory surplusage—because any conceivable remainder has been defined out of existence by the artifice of declaring that the state collects "under an assignment" exactly what it spends.

The Fifth Circuit then decided *Watson v. State of Texas*, 261 F.3d 436 (5th Cir. 2001), a Medicaid enforcement action with a somewhat different procedural posture. Confronting the Eleventh Amendment head on—but not addressing *Ex parte Young*—the Fifth Circuit concluded simply that the State of Texas had waived its sovereign immunity in the Master Settlement Agreement as to matters of enforcing that Agreement, and that the instant case was such a case of enforcement.

As to Congress' 1999 appropriations rider, the Fifth Circuit held exactly as the entire text, its context and legislative history compel: "The Federal Government has waived any claim it may have to reimbursements." *Id.* at 443 (citing 42 U.S.C. § 1396b(d)(3)(B)(i)). Nothing more, nothing less. The Second Circuit's "clear and unambiguous" *opposite* meaning had yet to become plain.

The Fifth Circuit then proceeded to its version of the merits, and concluded that Texas proceeded "directly" against tobacco companies, rather than through subrogation or assignment, and that the absence of state claims "under an assignment" accordingly failed to trigger § 1396k(b). *Id.* at 444. Thus, while the Seventh Circuit's disposition

essentially reads § 1396k(b) out of the statute books, the Fifth Circuit's disposition permits a state to accomplish that remarkable result at its pleading discretion (*viz.*, by proceeding "directly" against a third-party tortfeasor, rather than "under an assignment").

Ten days after the Fifth Circuit's disposition, the Eleventh Circuit decided *McClendon v. Georgia Dept. of Community Health*, 261 F.3d 1252 (11th Cir. 2001). Doubling back to the Seventh Circuit's approach, and likewise finding the *Ex parte Young* issues "much thornier," *id.* at 1259, the Eleventh Circuit skipped to the merits, and concluded that Georgia only collected under the statutory assignment "what it actually spent on medical assistance." *Id.* at 1261. Again, the deceptively elegant appearance of this disposition (assignment equals collection) belies what is in fact a complete evisceration of § 1396k(b)—or that portion of it that benefits Medicaid recipients. In the Seventh and Eleventh Circuits, the phrase, "and the remainder of such amount collected shall be paid to such individual," has disappeared from the United States Code, there no longer being any possibility of such a "remainder."

The Tenth Circuit weighed in next with yet a fourth approach to the issues. In *Harris v. Owens*, 264 F.3d 1282 (10th Cir. 2001), the court first concluded that it was obliged to resolve the Eleventh Amendment issue. "Once effectively raised, the Eleventh Amendment becomes a limitation on our subject-matter jurisdiction, and we may not then assume 'hypothetical jurisdiction' to reject a plaintiff's claim on the merits." *Id.* at 1288.

Thereupon, the Tenth Circuit finally addressed and authoritatively dispatched the mischief wrought by the Wisconsin district court in *Floyd*. "From a purely economic perspective, it may be irrelevant that the settlement funds are to be paid over time rather than all at once; the future amount

can be reduced to present value. For the purposes of the Eleventh Amendment, however, the difference is highly relevant." *Id.* at 1291-92. Concluding that the state's decision to keep the entire tobacco windfall "may constitute an ongoing violation of federal law," and that the plaintiff sought only "prospective" relief with respect to future collections, the Tenth Circuit concluded that *Ex parte Young* operated to avoid the Eleventh Amendment bar. The court only then turned to the merits. For multiple reasons discussed hereunder, the Tenth Circuit erred in concluding that Congress' 1999 appropriations rider *sub silentio* stripped Medicaid recipients of their vested statutory rights under § 1396k(b).

A month later, the Second Circuit decided *Tyler v. Douglas*, 280 F.3d 116 (2nd Cir. 2001). And on January 28, 2002, the First Circuit decided *Greenless v. Almond*, 277 F.3d 601 (1st Cir. 2002). Those Courts skipped the Eleventh Amendment question, and proceeded directly to Congress' 1999 amendment. Whereas the Seventh Circuit simply saw ambiguity and the Fifth Circuit simply saw a federal waiver, the First and Second Circuits found "clear and unambiguous" evidence that Congress had quietly and retroactively stripped millions of Medicaid recipients of their vested statutory rights under section 1396k(b). App. 10a-17a.

The district and circuit courts require guidance.

II. Congress' 1999 Emergency Appropriations Rider Does Not Even Reference, Much Less Repeal, Section 1396k(b) or the Vested Rights Embodied Therein.

After intense lobbying by the States to prevent the federal government from claiming its share of the tobacco settlement as a Medicaid recovery, Congress included a rider to the Emergency Supplemental Appropriations Act of 1999 providing that HCFA would not treat tobacco settlement

funds as an overpayment to the States for the purpose of offsetting future federal Medicaid matching funds. In other words, the federal government waived its claim to its share of the tobacco settlement.

The 1999 Amendment to 42 U.S.C. § 1396b(d)(3) provides as follows:

> (A) The pro rata share to which the United States is equitably entitled, as determined by the Secretary, of the net amount recovered during any quarter by the State or any political subdivision therefor with respect to medical assistance furnished under the State plan shall be considered an overpayment to be adjusted under this subsection.
>
> (B)(i) Subparagraph (A) and paragraph (2)(B) shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products, as defined in section 5702(d) of Title 26 [26 U.S.C.A. § 5702(d)], and State Attorneys General, or as part of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.
>
> (ii) Except as provided in subsection (i)(19), a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

42 U.S.C. § 1396b(d)(3).

The Tenth, Second, and First Circuits have now concluded—based solely upon the last sentence of the appropriations rider—that rather than simply waiving the federal government's rights to its share of the tobacco settlement, which is all Congress ever debated, the rider somehow

lurched into distant sections of federal Medicaid law, *sub silentio* repealed § 1396k(b)—a section of the Medicaid Act **50 pages away** in the United States Code—and retroactively stripped Medicaid recipients of substantial vested rights without ever mentioning § 1396k(b) or Medicaid recipients. Such an interpretation bears neither logical nor constitutional scrutiny.

A. The Text and Context of the 1999 Appropriations Rider Demonstrate Plainly That Congress Waived Only the Federal Government's Share of the Tobacco Settlement.

Congress expressly understood the tobacco settlement to be a Medicaid recovery, subject to supreme federal Medicaid law—and then chose to treat the tobacco settlement proceeds in the section of federal Medicaid law dealing with how the federal government calculates annual Medicaid payments it will make to states. The straightforward text and context of the 1999 appropriations rider confirms that it concerns *only* the portion of the tobacco settlement to which the federal government would have been entitled.

Subsection **(A)** expressly refers to the "share to which the United States is equitably entitled." Subsection **(B)(i)** of the 1999 appropriations rider then says simply that this federal "share" shall not apply to the tobacco settlement. Subsection **(B)(ii)** then says that States may "use the sums described in clause (i) [*i.e.*, the federal share of the tobacco settlement] for any expenditures determined appropriate by the State."

The foregoing context and structure is significant. Congress targeted one, and only one section of federal Medicaid law—the section previously enumerated 1396b(d)(3), which it renumbered 1396b(d)(3)**(A)** in 1999, and to which it added

subsection **B** to address only the "share to which the United States is equitably entitled." *See* 42 U.S.C. § 1396b(d)(3).[3]

Conspicuous as well is what Congress did *not* do—amend or repeal or even mention § 1396k(b)—which it easily could have done and would have been obliged to do if it intended such a radical divestiture of statutory property rights. Though "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change," *United States v. Fausto*, 484 U.S. 439, 453 (1988), the 1999 appropriations rider never mentions section 1396k(b), never mentions Medicaid recipients, and never mentions any intent to repeal or affect any other portion of federal Medicaid law.

The title of the appropriations rider[4] reinforces the specific and limited scope of Congress' concern: "PROHIBITION ON TREATING ANY FUNDS RECOVERED FROM TOBACCO COMPANIES AS AN **OVERPAYMENT** FOR THE PURPOSES OF MEDICAID." *See Conference Report on 1999 Emergency Supplemental Appropriations Act*, 145 Cong. Rec. H3175, 3200 (emphasis added). The technical term "overpayment" applies specifically and exclusively to

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[3] By definition, of course, and as discussed in greater detail *infra*, appropriations measures concern *only* money going into or coming out of the federal government. They do not, and generally *cannot*, affect substantive statutory provisions, much less effect a massive confiscation of property belonging to private citizens.

[4] While not a dispositive feature of statutory construction, the title of an enactment may certainly point the way—especially where, as here, the title specifically signals the scope of the enactment, and no other textual evidence points *specifically* to a different or larger scope. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("We also note that 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.") (quoting *Trainmen v. Baltimore & Ohio RR. Co.*, 331 U.S. 519, 528-529 (1947)).

funds to which the federal government would otherwise be entitled.[5]

The Second Circuit construed the 1999 appropriations rider to strip Medicaid recipients of their rights under § 1396k(b) by concluding that it would decline to consider any other evidence of congressional intent—context, legislative history, primary canons of construction, constitutionality, contrary rules in both houses of Congress, and common sense—because the last sentence was allegedly "plain" in stripping Medicaid recipients of their rights. App. at 15a.

The Second Circuit effectively treated the last sentence of the appropriations rider as an independent statute, divorced from context and legislative history. Yet this Court has repeatedly emphasized that **text**—even assertedly "unambiguous" text—depends upon **context**. *See Bailey v. United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning" of statutory text—"but also its placement and purpose in the statutory scheme."); *accord FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

Moreover, the Second Circuit's treatment of subsection (B)(ii) as an independent repeal of substantive Medicaid law renders the 1999 appropriations rider bizarre. If Congress had truly intended to say that states were free to spend all of the tobacco settlement proceeds in whatever manner they pleased, notwithstanding the § 1396k(b) distribution rules or any other provision of federal law, then Congress could have enacted a statute that simply **said that**. Congress need never have concerned itself with the technical subject of "overpayments." If states can spend all of the money

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[5] This meaning of the term "overpayment" is expressly set forth in the statute itself, at § 1396b(d)(3)(A), which existed before the 1999 Amendment and was merely renumbered to add "(A)."

however they please, then *a fortiori* none of the tobacco settlement proceeds constitute "overpayments" or are otherwise subject to any federal equitable entitlement. In other words, the Second Circuit interpretation renders superfluous every word in the 1999 appropriations rider except for clause (B)(ii). There would have been no need for clause (B)(i) if indeed Congress intended to liberate the states to spend all of the tobacco settlement proceeds however they please, notwithstanding any contrary provision of federal law.

This Court recently reiterated the critical canon of statutory construction that forbids exactly what the Second Circuit (as well as the Tenth and First Circuits) did. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, —, 122 S.Ct. 441, 449 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

The question then naturally arises: why did Congress include language in subsection(B)(ii) that appears to free the states from constraint in spending tobacco settlement proceeds (or more precisely, the federal share of the tobacco settlement proceeds)? The answer, as the next section makes abundantly clear, is that the debate in Congress at the time of the 1999 enactment was on whether to give **the federal share** to the states without conditioning its use, or whether to give **the federal share** to states **with the stipulation that they must spend some or all of the federal share on specified health programs**. Those favoring conditions on the federal share lost. The rider ultimately enacted made clear that the federal government would not dictate how states must spend **the federal share**, despite the federal

government's "equitable entitlement" to a substantial part of the tobacco settlement.

B. The Legislative History of the 1999 Appropriations Rider Unambiguously Confirms That Congress Addressed Only the Federal Share of the Tobacco Settlement.

The Senators debating the federal treatment of the tobacco settlement divided roughly into two camps: one that wanted to let the states keep the federal government share and spend it however they wish; and another that wanted to let the states keep the federal government share, but make them spend it (or a portion of it) on salutary health programs.

Typical of the camp opposing the rider that was ultimately enacted, and instead favoring conditions on spending the federal share of the tobacco settlement, was this statement by Senator Kennedy:

> States are free to use **the state share** of their recoveries in any way they choose. However, Congress has a clear and compelling interest in how **the federal share** will be used.

145 Cong. Rec. S2889-S2890 (March 18, 1999) (statement of Sen. Kennedy). Congress' focus *only* on **the federal share**—and the debate over whether the federal government would dictate how the States must spend **the federal share**—could hardly be more plain.

Senator Harkin, who sponsored a competing amendment, likewise hammered the central theme of the debate: whether Congress should impose spending conditions on **the federal share** of the tobacco settlement:

> I don't want to tell the States what to do with their money, but when the Federal taxpayers provide over 50 percent of Medicaid monies to the States and we are paying 50 billion bucks a year in health-related

> costs and much of that through Medicaid, then I think **we have a right and an obligation to say that some portion of that money that is Federal money** ought to go for health-related purposes.

145 Cong. Rec. S2886 (March 18, 1999) (statement of Sen. Harkin).

The ultimately enacted appropriations rider merely confirmed who won that debate: States would not be told by Washington how to spend **the federal share** of the tobacco settlement, despite the federal government's acknowledged claim to a substantial percentage of the states' Medicaid recovery. Instead, States could use that money—that is, the **federal share** specifically under consideration—"for any expenditures determined appropriate by the State." 42 U.S.C. § 1396b(d)(3)(B)(ii).

Most telling, the Conference Report concerning the appropriations rider expressly declares the subject of the enactment to be "**the Federal share of funds** recovered under [tobacco] settlements or judgments." Conference Report on 1999 Emergency Supplemental Appropriations Act, 145 Cong. Rec. H3175, 3200 (emphasis added).[6]

Senator Hutchison herself, the rider's chief sponsor, stated that the federal government planned to "seize $18.9 billion of the State tobacco settlement funds **for Medicaid recoupment**." 145 Cong. Rec. S1145, 1157 (emphasis added). Similarly, in introducing the rider, Senator Gorton from Washington (a co-sponsor) described it thus: "I join

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[6] *See Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'") (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)).

my Senate colleagues in introducing this legislation to prohibit **the federal government from trying to recoup any funds** from state governments recovered from tobacco companies as part of their tobacco settlement **or from determining how these funds should be spent."** *Id.* at 1159 (emphasis added). Senator Leahy from Vermont (a co-sponsor) similarly described the rider as "legislation to prohibit the **Federal government from recouping** any part of the [tobacco] settlement"). *Id.* at 1161 (emphasis added). Senator Levin from Michigan (another co-sponsor) stated: "I will support an amendment to this bill which will keep in the states any so called **'federal share' funds**"). 145 Cong. Rec. S2342 (emphasis added).

Additionally, every one of the letters submitted to Senator Hutchison by state and local entities in support of the rider makes clear that the purpose of the rider, and the sole motivation for the intensive lobbying effort behind the rider, was to prevent recoupment of **the federal share** of the tobacco settlement, and that no part of the debate pertained to the Medicaid recipients' share.[7]

What is "plain," upon examination of the rider's text in its context, as amply reinforced by the legislative history, is that Congress treated **the federal share** of the tobacco

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[7] *See, e.g.*, letter from National Governors Association ("A major priority for the nation's Governors during the 106th Congress is ensuring that state tobacco settlement funds are protected from unwarranted **seizure by the federal government**"); letter from National Association of Attorneys General (supporting the rider because it protects "the state tobacco settlements from **seizure by the federal government**"); letter from the National Association of Counties (referencing **"federal recoupment"** and **"the federal government's claim"**); letter from the National League of Cities (supporting the rider because it "would prevent the **federal government** from taking a portion of state tobacco revenues"). 145 Cong. Rec. S1145, 1157-58.

settlement—nothing more, nothing less. The total silence of Congress with respect to § 1396k(b) and Medicaid recipients simply cannot yield a conclusion that Congress nevertheless stripped their substantive and vested rights in a sentence clearly rooted in the rights of the federal government vis-à-vis the states. As once observed by Chief Justice Rehnquist and appropriate here, "[i]n a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) (internal quotations omitted) (quoted in *St. Cyr*, 533 U.S. at 320 n.44. Only judicial usurpation of a legislative function would now read § 1396k(b) out of the law by stealth.

C. Congress' 1999 Rider Could Not Have Properly Repealed Section 1396k(b) by Implication—Which Applies With Even Greater Force in an Appropriations Measure.

Whether reasonable minds may differ as to the meaning of the statutory text at issue, three observations about the 1999 appropriations rider are indisputable: (1) neither its text nor the legislative history ever mentions section 1396k or Medicaid recipients, much less discloses express intent to repeal that independent law or affect the rights of Medicaid recipients in any way; (2) the 1999 rider was an *appropriations* measure, to which specific rules and limitations apply in the task of interpretation; and (3) Petitioner's interpretation of the 1999 appropriations rider, as amply supported by textual cues and legislative history, is *at least* a plausible interpretation that harmonizes all relevant parts of federal Medicaid law. Taken together, these propositions yield a single conclusion consistent with

controlling precedent: Congress did not strip Medicaid recipients of their section 1396k rights.

"[R]epeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest." *Rodriguez v. United States*, 480 U.S. 522, 524 (1987)) (citations and internal quotation marks omitted). "In the absence of some affirmative showing of intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550 (1974); *accord United States v. Boffa*, 688 F.2d 919, 932 (3d Cir. 1982). There is clearly no "positive repugnancy between the provisions" of section 1396k(b) and section 1396b(d)(3), as would be required for a finding of a legislative intent to repeal Section 1396k. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).[8]

Section 1396b(d)(3) and section 1396k(b) *can* be read in harmony, and therefore *must* be read in harmony. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) ("[W]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). Section 1396b(d)(3) prohibits the reduction of future federal Medicaid payments to states based upon tobacco settlement proceeds, and then (a) imposes no specific restrictions on the states' ability to spend that *federal* portion of the settlement, and (b) imposes no specific restrictions on the states' ability

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[8] Technically, the Tenth, Second, and First Circuit constructions of the 1999 amendment constitute a "partial" implied repeal of section 1396k(b), as only rights with respect to the tobacco settlement are purportedly affected. The difference is irrelevant. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974) ("A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled.").

to spend *their legal portion* of the settlement amount. Section 1396k(b) provides that any portion of the settlement amount that exceeds the state and federal government's Medicaid costs, and that is therefore neither the "federal" portion nor the states' "legal portion" of the settlement amount, shall go to the injured Medicaid recipients.

Any decision interpreting Congress' 1999 appropriations rider as anything other than a waiver of the federal government's share of the tobacco settlement proceeds creates a new and unprecedented principle of interpreting, and erasing, legislative enactments, and arrogates to the judiciary a function assigned to Congress by the most fundamental principles of our federalist form of government. *See Rotec Industries, Inc. v. Mitsubishi Corp.*, 215 F.3d 1246, 1258 (Fed. Cir. 2000).

The Second Circuit took artificial refuge in one canon of statutory construction—and misapplied it—in holding that the 1999 appropriations rider constitutes a "specific" statute that governs the "general" statute in section 1396k(b). See App. at 16a-17a. But, again, "specific" versus "general" is irrelevant where two statutes can be construed harmoniously. *See, e.g., Tyler v. United States*, 929 F.2d 451, 456 (9th Cir. 1991) ("Faced with an apparent conflict between an earlier specific statute and a later general statute, the commission took the appropriate step of harmonizing the two."). The Second Circuit simply ignored the cardinal canon of construction—especially in the context of implied repeals: if two statutes *can* be reconciled, they *must* be reconciled. *Monsanto Co.*, 467 U.S. at 1018.

Moreover, there is not, in fact, any applicable "specific over general" statute here. In its 1999 amendment, Congress addressed one aspect of the tobacco settlement. Congress was obviously *not* "specific"—quite the opposite—about the rights of Medicaid recipients. The only statute "specifically"

addressing the rights of Medicaid recipients is § 1396k(b). The "specific over general" proposition might have applied *if* Congress had "specifically" amended § 1396k(b) and made it clear that the tobacco settlement was to be exempted from 1396k(b)'s mandate. In that event, regardless whether Congress had mentioned Medicaid recipients (though it would have been peculiar not to), its more specific *later* treatment **of § 1396k(b)** would have governed that statute's general mandate.

To the rigorous presumption against implied repeal, this Court has added an even more forceful condemnation of implied repeals in **appropriations** measures. *See especially TVA*, 437 U.S. at 190 (doctrine disfavoring repeals by implication applies "with even *greater* force when the claimed repeal rests solely on an Appropriations Act"). In *TVA v. Hill*, this Court emphasized the significant practical danger of reading too much about substantive law into appropriations measures, upon which Congress itself has fastened strict limitations on scope. Id. at 190-191 (citing House Rule XXI(2) and Standing Rules of the Senate 16.4)

One authority described the critical federalist underpinning of this principle as follows:

> A doctrine that valuably distinguishes the judicial and legislative roles is the principle that federal courts do not assume that Congress uses one statute to implicitly repeal an earlier one. ... Repeal in an appropriations statute, in particular, is an acceptable conclusion only if Congress expressly relates the appropriations proviso to a previous law. The appropriations language must leave no doubt about legislative intent, like stating that no funds may be available to implement a previously authorized purpose, "notwithstanding" stated portions of the law identified in the appropriations bill.

L. Fisher, Statutory Construction: Keeping a Respectful Eye on Congress, 53 SMU L. Rev. 49, 61 (Winter 2000) (citing *United States v. Dickerson*, 310 U.S. 554, 555 (1940)); *accord Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992). Nothing in the 1999 appropriations rider even remotely satisfies these conditions for implied repeal in an appropriations measure.

Any determination that Congress' rider to the 1999 Emergency Supplemental Appropriations Act somehow repealed the disbursement requirements contained in section 1396k(b) would (1) erroneously disregard the rigorous presumption against repeals by implication, *and then* (2) erroneously assume "that Congress meant to repeal *pro tanto* § [1396k(b)] of the [Medicaid] Act by means of a procedure expressly prohibited under the rules of Congress," *TVA*, 437 U.S. at 191, *and then* (3) erroneously insist that Congress did this remarkable deed without ever even mentioning § 1396k(b) or the rights embodied therein.

The Second Circuit panel declined even to address the issue of limitations on the scope of appropriations measures. And this case, perhaps even more than *TVA v. Hill*—with which the Second Circuit opinion irreconcilably conflicts—demands application of the principle that appropriations measures cannot repeal substantive law located fifty pages away in the United States Code without any hint of intention to do so.

D. Interpreting Congress' 1999 Appropriations Rider to Destroy Medicaid Recipients' Vested Remainder Rights Poses Serious Constitutional Problems and Must Therefore Be Avoided.

Under the law that existed when the MSA was executed (and, Petitioner contends, still exists), Petitioner and others similarly situated acquired a § 1396k(b) right to the remainder of the state's Medicaid recovery. Thereafter,

Congress enacted § 1396b(d)(3). According to the Second Circuit, Petitioner thereupon lost that extraordinarily valuable property right—though Congress never mentioned any intent to affect Medicaid recipients at all, much less extinguish their entitlement to future proceeds of an executed settlement.[9] Such a result impermissibly operates retroactively *and* works an unconstitutional taking—infirmities easily avoided by doing what this Court commands in the first instance: harmonizing two statutes where that is fairly possible.

"A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *St. Cyr*, 533 U.S. at 321 (internal quotations omitted). Assuming only *arguendo* that Congress had the power even *expressly* to repeal the disbursement provisions of § 1396k for purposes of the tobacco settlement,[10] it did no such thing.

"[T]he first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively." *Id.* at 316 (citing *Martin v. Hadix*, 527 U.S. 343 (1999)). The most rudimentary

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9 There can be no dispute that the § 1396k(b) remainder interest is a protected property interest. Among other indicia, state law routinely recognizes the competing property interests in recoveries by Medicaid recipients. *See, e.g., Roberts v. Total Health Care*, 349 Md. 499, 513, 709 A.2d 142, 148 (1998) ("To the extent the settlement proceeds were intended to compensate for medical care they were not the property of the [Medicaid] recipients."). Here, Congress adds its express imprimatur through § 1396k(b).

10 For purposes of assessing the constitutionality of confiscating Petitioner's § 1396k(b) remainder interest, it is irrelevant that the precise amount due cannot yet be quantified. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980).

threshold for such "clarity" would require, at a minimum, express identification of (a) the specific right to be stripped; and (b) the class of people whose substantive rights are to be stripped. Congress identified neither. Indeed, this Court has observed that cases where it "has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation." *Id.* at 316-17 (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997)).

Moreover, as this Court recently emphasized, statutes must be interpreted to avoid *not* merely unconstitutional results, but "difficult constitutional questions." *Id.* at 300 & n.13. Where, as clearly here, "an alternative interpretation of the statute" that avoids any constitutional thicket is "fairly possible," courts "are obligated to construe the statute to avoid such problems." *Id.* at 300. The threshold constitutional proposition—that § 1396k(b) confers on Plaintiffs a vested property interest that § 1396b(d)(3) would extinguish by stealth according to some circuits—raises a sufficient constitutional problem to opt against reading § 1396b(d)(3)(ii) in a vacuum. And, more to the point, no such reading and no such interpretive entanglement is necessary, as the alternative construction pressed herein is more than "fairly possible."

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed December 27, 2001]

No. 00-7839

LAWRENCE TYLER, on behalf of himself
and all others similarly situated,
Plaintiff-Appellant,

v.

JAMES H. DOUGLAS, *et al.*
Defendants-Appellees

ORDER ON PETITION FOR REHEARING

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Lawrence Tyler.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

/s/ _____
Arthur M. Heller
Administrative Attorney

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed October 16, 2001]

No. 00-7839

LAWRENCE TYLER, on behalf of himself and all other similarly situated,

Plaintiff-Appellant,

v.

JAMES H. DOUGLAS, Tobacco Settlement Escrow Agent, in his official capacity, WILLIAM H. SORRELL, Attorney General of Vermont, in his official capacity, EILEEN ELLIOT, Commissioner, Vermont Department of Social Welfare, in her official capacity and LORI COLLINS, Third Party Liability Supervisor, Vermont Department of Social Welfare, in her official capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Vermont.

AFFIRMED

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont and was argued by counsel.

On consideration whereof, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is AFFIRMED in accordance with the opinion of this Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

/s/ _____
Arthur M. Heller,
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 00-7839

LAWRENCE TYLER, on behalf of
himself and all others similarly situated,
Plaintiff-Appellant,

v.

JAMES H. DOUGLAS, *et al.*
Defendants-Appellees.

Appeal from the United States District Court
for the District of Vermont
Honorable J. Garvan Murtha, Judge
Civil Action No. 1:00CV39

Argued: May 1, 2001
Decided: October 16, 2001

AFFIRMED

The Honorable ALVIN W. THOMPSON of the United States District Court for the District of Connecticut, sitting by designation.

In July 1998, the State of Vermont filed a lawsuit against manufacturers of tobacco products, seeking reimbursement of Medicaid expenditures made by the State for tobacco-related health conditions. Vermont had filed a separate lawsuit asserting other claims in May 1997, and in November 1998,

Vermont settled all of its litigation against the tobacco manufacturers pursuant to a Master Settlement Agreement. The claims of over 40 other states and governmental entities that were pursuing a variety of causes of action against tobacco manufacturers were also settled pursuant to that agreement. The claims settled by Vermont under the terms of the Master Settlement Agreement are much broader in scope than the claims asserted by the State in its lawsuits. The amount of money to be paid to Vermont pursuant to the Master Settlement Agreement will far exceed Medicaid expenditures by the State for tobacco-related health conditions.

Plaintiff Lawrence Tyler is a citizen of the State of Vermont who suffers from a tobacco-related health condition and has received medical assistance benefits for that condition through Vermont's Medicaid program. Tyler brought this action for a declaratory judgment and injunctive relief on behalf of all similarly situated persons, seeking to obtain the portion of the payments to Vermont under the Master Settlement Agreement in excess of that necessary to reimburse the State for its Medicaid expenditures for tobacco-related health conditions.

Tyler claims that the federal and Vermont laws governing the State's participation in the Medicaid program require that Vermont disburse the payments it receives under the Master Settlement Agreement in accordance with the provisions of 42 U.S.C. § 1396k(b). Each of the claims for relief set forth in his complaint is premised on this contention. The defendants moved to dismiss Tyler's complaint. The United States District Court for the District of Vermont (J. Garvan Murtha, Chief Judge) granted the motion to dismiss, finding that the plaintiff's claim was barred by the Eleventh Amendment as well as by 42 U.S.C. § 1396b(d)(3)(B)(ii), and finding that the complaint should also be dismissed for a number of other reasons. We conclude that the plaintiff's claim is barred by 42 U.S.C. § 1396b(d)(3)(B)(ii), and we

affirm the judgment of the District Court on that basis and do not decide the question of whether the plaintiff's complaint is barred by the Eleventh Amendment.

BACKGROUND

Medicaid is a joint federal and state cost-sharing program to finance medical services to low-income people. *See* Medicaid Act (Title XIX of the Social Security Act), 42 U.S.C. §§ 1396, 1396a-1396u (1992 & West Supp. 2000). The Centers for Medicare and Medicaid Services (formerly known as the "Health Care Financing Administration"[1]) of the United States Department of Health and Human Services ("HHS") is the federal agency which administers the Medicaid program at the federal level by promulgating regulations which implement the Medicaid program and which are binding on participating states.

> Although participation in the program is voluntary, participating States must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of [HHS]. To qualify for federal assistance, a State must submit to the Secretary and have approved a "plan for medical assistance," § 1396a(a), that contains a comprehensive statement describing the nature and scope of the State's Medicaid program. 42 C.F.R. § 430.10 (1989).

Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 502 (1990). See also *Concourse Rehab. & Nursing Ctr. v. Whalen*, 249 F.3d 136, 139 (2d Cir. 2001).

The Medicaid Act requires that a state plan must provide that "the State . . . must take all reasonable measures to

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[1] Effective July 1, 2001, the name of the Health Care Financing Administration was changed to "Centers for Medicare and Medicaid Services." *See http://cms.hhs.gov/about/reorg.asp; http://cms.hhs.gov/about/reorg.asp.asp.*

ascertain the legal liability of third parties . . . to pay for care and services available under the plan . . . ." 42 U.S.C.A. § 1396a(a)(25)(A) (West Supp. 2000). A state plan must also provide that "in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, the State . . . will seek reimbursement for such assistance to the extent of such legal liability." 42 U.S.C.A. § 1396a(a)(25)(B) (West Supp. 2000).

The amount of federal funding in a state's program is determined by a statutory formula set forth in 42 U.S.C. §§ 1396b(a) and 1396d(b). Section 1396b(d) provides for federal payments to each state made via quarterly advances based on the state's estimated expenditures. In estimating a state's expenditures, an adjustment is made to reflect overpayments or underpayments. *See* 42 U.S.C. § 1396b(d). Generally, amounts collected from third parties in compliance with 42 U.S.C. § 1396a(a)(25) are treated as overpayments to the extent that they exceed the amount necessary to reimburse the state for its expenditures, *see* 42 U.S.C. § 1396b(d)(2)(B), and the pro rata share to which the federal government is equitably entitled of the net amount recovered by a state during any quarter with respect to medical assistance furnished under that state's plan is also treated as an overpayment, *see* 42 U.S.C. § 1396b(d)(3)(A). Treatment of such amounts as overpayments decreases the amount the federal government must pay to the state. *See* 42 U.S.C. § 1396b(d)(2)(A).

The Medicaid Act also requires, in connection with a state's obligation to seek reimbursement from legally liable third parties, that a state plan must provide for "mandatory assignment of rights of payment for medical support and

other medical care owed to recipients in accordance with [42 U.S.C. § 1396k]." 42 U.S.C.A. § 1396a(a)(45) (West Supp. 2000). Section 1396k provides that:

> (a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance und the State plan approved under this subchapter, a State plan for medical assistance shall—
>
> (1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required --
>
> (A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute an assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and to payment of medical care from any third party;
>
> (b) Such part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual.

42 U.S.C.A. § 1396k (West Supp. 2000).

Vermont enacted specific statutes and adopted specific policies and procedures to enable it to comply with its obligations under the Medicaid Act. For instance, in

connection with § 1396k, Vermont requires all Medicaid applicants and recipients to sign, as a condition of eligibility, form DSW 202, which contains an assignment to the State of all rights of payment by third persons for medical support and other medical care for the recipient. Also, Vermont enacted 33 V.S.A. § 1907, a statute giving the State, in any case where a third person has a legal liability to make payment for expenses covered under the State's Medicaid program, subrogation rights to payment to the extent the State has made payment for such covered expenses. Vt. Stat. Ann. tit. 33, § 1907 (2000).

In May 1997, Vermont sued manufacturers of tobacco products in state court in Vermont, alleging public health and consumer fraud violations and seeking monetary, equitable and injunctive relief. Then, in April 1998, Vermont enacted a new statute, 33 V.S.A. § 1911, giving the State a direct cause of action against tobacco manufacturers for recovery of Medicaid expenditures for tobacco-related health conditions. Vt. Stat. Ann. tit. 33, § 1991 (2000). Consequently, in July 1998, Vermont filed a second state lawsuit against manufacturers of tobacco products, seeking reimbursement of Medicaid expenditures pursuant to 33 V.S.A. § 1911. Vermont's July 1998 complaint contained five statutory causes of action, each based on 33 V.S.A. § 1911(c).

Vermont settled its 1997 and 1998 lawsuits (collectively, the "Vermont Actions"), pursuant to a certain Master Settlement Agreement ("MSA") entered into between manufacturers of tobacco products and over 40 states and other governmental entities (the "Settling States") in November 1998. In the MSA, the tobacco companies agreed, *inter alia*, to make annual payments in perpetuity to the Settling States, to fund a national foundation dedicated to significantly reducing the use of tobacco products by youth and to abide by certain restrictions on promotional and lobbying activity. In return, the Settling States gave the manufacturers of tobacco

products an unconditional release of a broad array of claims and potential claims based on past and future conduct, acts or omissions. The "Released Claims" were much broader in scope than the claims asserted by the State in the Vermont Actions. Vermont expects to collect approximately $805 million in payments over the next 25 years pursuant to the MSA. The amount of these payments will far exceed the amount the State has paid and will pay in terms of Medicaid expenditures for tobacco-related health conditions.

In 1999, Congress debated whether payments under the MSA to Settling States were covered by the Medicaid Act, in which case the federal government would have a claim to a portion of those funds. There had been no agreement on this point. Prompted by a recognition of "the uncertainty about the legal status of the settlement funds and the desirability of congressional resolution in some manner," Congress addressed the status of the tobacco settlement funds in a rider to the Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 106-31, 113 Stat. 57, 103-04. *Harris v. Owens*, No. 00-1292, 2001 WL 1032907, at *10 (10th Cir. Sept. 10, 2001). It amended 42 U.S.C. § 1396b(d)(3) by adding thereto the current subparagraph (B). *See* 42 U.S.C.A. § 1396b(d)(3)(B)(i) and (ii) (West Supp. 2000). We set out and discuss the text of subparagraph (B) below.

DISCUSSION

Tyler contends that funds received by the State under the MSA constitute a Medicaid recovery, and that the Medicaid Act provides a federally mandated disbursement scheme for all Medicaid recoveries by the State from third parties. He argues that this mandated disbursement scheme, which is set forth in 42 U.S.C. § 1396k(b), applies regardless of whether the State brings its claim under a direct action statute, such as 33 V.S.A. § 1911, or pursuant to assigned rights provided for under § 1396k, because under either scenario, the State is merely fulfilling its obligation pursuant to 42 U.S.C.

§ 1396a(a)(25). Thus, he concludes the State is legally bound to disburse the amounts payable to it under the MSA in accordance with the provisions of § 1396k(b). Under such a disbursement scheme, the State would disburse to Tyler and similarly situated individuals that portion of the payments received by the State under the MSA in excess of the amount necessary to reimburse the State for its past or future Medicaid expenditures for tobacco-related health conditions.

The District Court dismissed Tyler's complaint as barred by the Eleventh Amendment and also on a number of other grounds. One of those other grounds was that Tyler's claim is barred by 42 U.S.C. § 1396b(d)(3)(B)(ii), and the State has included this point among its arguments on appeal. Because we conclude the complaint was properly dismissed on the ground that Tyler's claim is barred by § 1396b(d)(3)(B)(ii), we do not decide the question of whether there are Eleventh Amendment grounds for dismissal. "It is a familiar prudential rule of our jurisprudence that courts will not decide difficult constitutional questions if other bases of decisions are available." *Fed. Election Comm'n v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 290 n.2 (2d Cir. 1995) (citations omitted). *See also Floyd v. Thompson*, 227 F.3d 1029, 1034 (7th Cir. 2000) (recognizing, in case presenting identical issues, that "[t]he Eleventh Amendment analysis is complex" and electing to decide the case on another basis; also, giving examples of issues that court would have been required to decide had it proceeded with the Eleventh Amendment analysis); *McClendon v. Ga. Dept. of Cmty. Health*, 261 F.3d 1252, 1258 (11th Cir. 2001) (in case presenting identical issues, court exercised its discretion as to state official defendants to bypass Eleventh Amendment issue, interpreting defendants' position to be "[o]nly if we are going to decide the merits issue against them do they insist upon a ruling on the Eleventh Amendment issue."). *But see Harris*, 2001 WL 1032907 at *3 (in case presenting identical issues, court noted that, although it agreed with the court in *Floyd* that the merits

of the case were more easily resolved than was the Eleventh Amendment issue, it was "compelled by its precedent to decide the Eleventh Amendment issue first").[2]

We review *de novo* the District Court's decision to dismiss Tyler's complaint on the ground that his claim is barred by 42 U.S.C. § 1396b(d)(3)(B)(ii). *See Sullivan v. County of Suffolk*, 174 F.3d 282, 285 (2d Cir. 1999) ("We review *de novo* the district court's interpretation of a statute.").

Subparagraph (B) of § 1396b(d)(3), which was added by the 1999 amendments to the Medicaid Act, reads as follows:

> (i) Subparagraph (A) and paragraph (2)(B) shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products . . . and State Attorneys General, or as part of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.

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[2] In *Harris*, 2001 WL 1032907, at *4-*12, the court then concluded that the Medicaid recipient's claim was not barred by the Eleventh Amendment, but was barred by 42 U.S.C. § 1396b(d)(3)(B)(ii). Also, the court noted there that : "[v]irtually every court, state or federal, that has considered one of these cases has dismissed it either because of sovereign immunity or because the Master Settlement Agreement was not a Medicaid settlement subject to § 1396k(b). [*See, e.g.*], *Watson v. Texas*, 2001 WL 883533 (5th Cir. 2001) (merits); *Floyd v. Thompson*, 227 F.3d 1029 (7th Cir. 2000) (merits); *Cardenas v. Anzai*, 128 F.Supp. 2d 704 (D.Haw. 2001) (Eleventh Amendment); *Strawser v. Lawton*, 126 F. Supp. 2d 994 (S.D.W.Va. 2001) (merits); *Skillings v. Illinois*, 121 F. Supp. 2d 1235 (C.D. Ill. 2000) (merits); *Martin v. New Mexico*, 197 F.R.D. 694 (D.N.M. 2000) (Eleventh Amendment); *Barton v. Summers*, 111 F. Supp. 2d 989 (M.D. Tenn. 2000) (Eleventh Amendment); *State v. Superior Court*, 83 Call. App. 4th 597, 99 Cal. Rptr. 2d 735 (Ct. App. 2000) (merits). The sole exception of which we are aware is *Lewis v. Clark*, No. LACV-037031 (Iowa Dist. Ct. July 21, 2000), an unreported decision denying Iowa's motion to dismiss with little discussion." *See also McClendon*, 261 F.3d at 1262 (merits).

> (ii) Except as provided in subsection (i)(19), a State may use amounts of recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

42 U.S.C.A. § 1396b(d)(3)(B) (West Supp. 2000). The exception in clause (ii) refers to a prohibition against making payments "with respect to any amount expended on administrative costs to initiate or pursue litigation described in subsection (d)(3)(B)." 42 U.S.C.A. § 1396b(i)(19) (West Supp. 2000).

Tyler argues that § 1396b(d)(3)(B) applies only to the portion of a state's tobacco settlement funds that would have constituted the federal government's share of the settlement by virtue of § 1396b(d)(3)(A) or § 1396b(d)(2)(B), which provide for the treatment of certain amounts of overpayments. He construes clauses (i) of § 1396b(d)(3)(B) as prohibiting reduction of the amount of federal payments on account of a state's receipt of tobacco settlement funds, and clause (ii) as providing that, with one exception, there is no restriction on a state's ability to spend funds that, but for the provisions of clause (i), would have constituted the federal government's share of the tobacco settlement.

In determining the proper interpretation of a statute,

> [t]his court will "look first to the plain language of a statute and interpret it by its ordinary, common meaning." *Luyando v. Grinker*, 8 F.3d 948, 950 (2d Cir. 1993). "If the statutory terms are unambiguous, our review generally ends and the statute is construed according to the plain meaning of its words." *Greenery Rehab. Group, Inc. v. Hammon*, 150 F.3d 226, 231 (2d Cir. 1998).

Sullivan, 174 F.3d at 285 (interpreting 42 U.S.C. § 1396p(d)). Accordingly, we look first to the plain language of

§ 1396b(d)(3)(B). We agree that clause (i) of paragraph (3)(B) served only to exempt the State's tobacco settlement funds from being treated as an overpayment pursuant to § 1396b(d)(3)(A) and § 1396b(d)(2)(B). However, the plain language of clause (ii) of paragraph (3)(B) compels the conclusion that § 1396b(d)(3)(B)(ii) is not limited in applicability to that portion of a state's tobacco settlement funds that would have been treated as an overpayment but for the provisions of paragraph (3)(B)(i).

The language of paragraph (3)(B)(ii) is clear and unambiguous. By its express terms, it applies to "amounts recovered or paid to the State as part of a comprehensive or individual settlement . . . " and it provides that, with the exception for certain costs associated with litigation, states may use tobacco settlement funds "for any expenditures determined appropriate by the State." 42 U.S.C. § 1396b(d)(3)(B)(ii). Nothing in the language of this paragraph limits, expressly or by implication, its applicability to that portion of the tobacco settlement funds that would otherwise be treated as an overpayment. Giving the language its ordinary, common meaning, "amounts recovered or paid to the State as part of" a tobacco settlement include more than just that portion of a state's tobacco settlement funds that would have been treated as an overpayment but for the provisions of clause (i). Such amounts include the balance of those settlement funds as well.

Tyler contends the State's tobacco settlement funds should be divided into two parts, *i.e.*, a portion equal to the amount the State is entitled to retain as reimbursement for medical assistance payments made by the State for tobacco-related health conditions, and a portion equal to the excess over that amount. However, under the ordinary, common meaning of the statutory language at issue here, both of these parts would be included in their entirety in "amounts recovered or paid to

the State" under the MSA. Otherwise, those funds could not, in the language of § 1396k(b), be "retained" by the State or "paid" by the State to Tyler and other Medicaid recipients.

We agree with the court in *Harris* that:

> [a]ll of the settlement funds go to the state . . . ; in plain English, the state has "recovered" or "been paid" funds, even if those funds are in turn owed to a third party. Thus when § 1396b(d)(3)(B)(ii) refers to money "recovered or paid to the State," it is referring to any money that goes to the state under the tobacco settlement agreement.

Harris, 2001 WL 1032907, at *10. *See also Strawser v. Lawton*, 126 F. Supp. 2d 994, 1000 (S.D.W. Va. 2001) ("[n]o construction or divination of Congressional intent is necessary . . . . [t]he statute is an unambiguous Congressional mandate vesting in the participating states a complete right, title, and interest to the settlement proceeds, excepting only litigation expenses.").

Thus, under the plain language of the statute, § 1396b(d)(3)(B)(ii) applies to all amounts received by the State pursuant to the MSA, and the State has the right, under the express terms of that statute, to use those amounts for any expenditures it determines are appropriate. Therefore, Tyler's claim is barred.

The foregoing analysis is based on the plain language of a statute whose language we find to be clear and unambiguous. That is where our inquiry should end "except in rare exceptional circumstances." *Greene v. United States*, 79 F.3d 1348, 1355 (2nd Cir. 1996).

> Although a statute's plain language is generally dispositive, it sometimes will yield when evidence of legislative history is so strong to the contrary that giving a literal reading to the statutory language will result in defeating Congress' purpose in enacting it. *See*

> *American Land Title Ass'n*, 968 F.2d at 155; *see also United States v. Ron Pair Enters.*, 489 U.S. 235, 242 [] (1989) (urging departure from plain meaning when it would "produce a result demonstrably at odds with the intentions of its drafters.").

Id., at 1356. Tyler argues, in substance, that this case presents the equivalent of such rare and exceptional circumstances.

Tyler contends that the District Court erred in dismissing his complaint on the basis of § 1396b(d)(3)(B)(ii) because Tyler has rights to a portion of the State's tobacco settlement funds pursuant to a mandatory disbursement scheme provided for under § 1396k(b) and there is no indication in either the language or the legislative history of § 1396b(d)(3)(B)(ii) that it was intended to override those rights. As to the language of the statute, the State takes the position that § 1396b(d)(3)(B)(ii) controls over 42 U.S.C. § 1396k(b) to the extent they are in conflict. We agree.

"Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). "When two statutes are in conflict, that statute which addresses the matter at issue in specific terms controls over a statute which addresses the issue in general terms, unless Congress has manifested a contrary aim." *Greene*, 79 F.3d at 1355. Section 1396k(b) is a general statute which applies to all recoveries made under an assignment from any tortfeasor, which § 1396b(d)(3)(B)(ii) is a more specific statute which applies only to amounts recovered or paid to a state as part of a settlement or a judgment reached in litigation with a manufacturer of tobacco products. Thus, to the extent the two statutes are in conflict, § 1396b(d)(3)(B)(ii), as the statute addressing the matter at issue in specific terms, controls unless there is a clear intention by Congress to the contrary.

Here, even if one assumes *arguendo* that Tyler would otherwise have rights to a portion of the State's tobacco settlement funds pursuant to § 1396k(b), there is no indication in the language of either statute of a clear intention on the part of Congress that § 1396k(b) be controlling over the statute specifically enacted by Congress to address the states' rights to payments they recover under the MSA and any other amounts they recover or are paid as part of a settlement of judgment in litigation against manufacturers of tobacco products. Likewise, there is no indication in the legislative history of any such intention, much less a clear intention, on the part of Congress.[3] We note that in *Harris*, the court also reviewed the legislative history and discussed it in detail. It stated that it had "found nothing that indicates that Congress considered individual claims at all. Thus, the reference to legislative history is unhelpful." *Harris*, 2001 WL 1032907 at *12. We concur with that assessment.

Thus, there is no ambiguity in the language of § 1396b(d)(3)(B)(ii) and no other reason why further inquiry into the meaning of this statute would be appropriate. *See Greene*, 79 F.3d at 1353 ("[W]hen we find the terms of a statute unambiguous, judicial inquiry is complete, except on rare and exceptional circumstances.") (internal quotation marks and citation omitted). Accordingly, we conclude that the District Court properly dismissed Tyler's complaint because his claim is barred by 42 U.S.C. § 1396b(d)(3)(B)(ii).

CONCLUSION

For the reasons states, the judgment appealed from is affirmed.

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[3] Tyler relies on only one aspect of the legislative history of § 1396b(d)(3)(B), namely, that there was competing legislation that would have required the states to use "a portion of such funds for tobacco use prevention and health care and early learning programs." 145 Cong. Rec. S2503-05 (1999). However, the fact adds no weight to Tyler's argument.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Civil No. 1:00CV39

LAWRENCE TYLER, on behalf of himself
and all others similarly situated,
Plaintiffs,

v.

JAMES H. DOUGLAS, *et al.*
Defendants.

RULING ON MOTION TO DISMISS

The plaintiff in this putative class action claims that, as a result of Vermont's participation on the settlement of a multi-state suit against the tobacco companies, the State must pay a portion of the money it collects to him and other similarly-situated Medicaid recipients. Although he clearly seeks to require the State to disburse funds which are to be deposited in the State treasury, the plaintiff has attempted to avoid potential Eleventh Amendment problems by framing his complaint in terms of "declaratory" and "injunctive" relief. *See* Complaint (paper 1) at 17-20; *see also Ex Parte Young*, 209 U.S. 123 (1908).

The defendants have moved to dismiss the plaintiff's complaint as barred by the Eleventh Amendment and for lack of standing. *See* Motion to Dismiss (paper 7). For the reasons set forth below, the Motion to Dismiss is GRANTED.

The plaintiff relies on 42 U.S.C. § 1396k(b), the provision of the Medicaid Act which requires state officials to recover

Medicaid costs from certain third-parties and to forward any portion of the recovery in excess of those costs to the injured Medicaid recipients. Section 1396k(b) provides:

> Such part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual.

The gravamen of the plaintiff's argument is that, since Vermont participates in the Medicaid program, it is bound to comply with § 1396k(b). There are several problems with plaintiff's theory. First, 33 V.S.A. § 1911(d) makes clear that the State's participation in the tobacco settlement is "independent of and not to be construed to affect any rights or causes of action by an individual Medicaid benefits recipient to recover damages or other relief as a result of a tobacco-related health condition." Accordingly, by statute, Vermont has expressly indicated the tobacco settlement was not meant to provide a vehicle for individuals such as this plaintiff to claim entitlement to excess recovery under Medicaid. *See* 33 V.S.A. § 1911(e).

Second, the settlement agreement provides that the tobacco companies' payments cover a variety of actual or non-medical damages accrued by the State as of the date of the Agreement. The recovery under the settlement agreement does not appear to include a separable, excess recovery which Congress contemplated as payable to an individual under the Medicaid Act. *See* Master Settlement Agreement (appended to Plaintiff's Opposition as Exhibit J) at § VXIII(d) ("All payments to be made by the Participating Manufacturers

pursuant to this Agreement are in settlement of all of the Settling States' antitrust, consumer protection, common law negligence, statutory, and equitable claims for monetary, restitutionary, equitable and injunctive relief alleged by the Settlement States with respect to the year of payment or earlier years, except that no part of any payment under this Agreement is made in settlement of an actual or potential liability of a fine, penalty (civil or criminal) or enhanced damages or is the cost of a tangible or intangible asset or other future benefit.").

Third, "[b]ecause Congress intended Medicaid to be the 'payor of last resort,' the state agency that administers Medicaid must seek reimbursement from any third party *responsible* for the patient's medical expenses." *Sullivan v. County of Suffolk*, 174 F.3d 282, 285 (2d Cir. 1999) (emphasis added). For example, an agency administering Medicaid may place a lien on a recipient's personal injury claims against a tortfeasor to recover medical expenditures. *Id.* The problem here is that, on its face, the settlement agreement does not establish the tobacco companies' legal liability for plaintiff's maladies. *See* Master Settlement Agreement at § XVIII(e) ("This Agreement is not intended to be and shall not in any event be construed or deemed to be . . . an admission or concession or evidence of (1) any liability or any wrongdoing whatsoever on the part of any Released Party. . . ."). Therefore, the settlement agreement at issue does not render the tobacco companies third parties responsible for this particular plaintiff's medical expenses as contemplated by the Medicaid Act.

Fourth, Congress has amended the Medicaid Act with the apparent purpose of, *inter alia*, avoiding the type of litigation which this plaintiff seeks to pursue. Under recently enacted 42 U.S.C. § 1396b(d)(3)(B),

> (i) Subparagraph (A) and paragraph (2)(B) shall not apply to any amount recovered or paid to a State as part

> of the comprehensive settlement of November 1998 between manufacturers of tobacco products, as defined in section 5702(d) of Title 26, and State Attorneys General, or as part of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.
>
> (ii) Except as provided in subsection (i)(19), a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

This provision clearly negates plaintiff's claim of a right to dictate the use of any portion of the tobacco settlement proceeds. In light of this statutory amendment, the plaintiff has no standing to challenge the State's planned use for tobacco settlement proceeds.

Finally, in light of the plaintiff's failure to allege a violation of federal law which arises from Vermont's participation in the tobacco settlement, this complaint is barred by the Eleventh Amendment. As the Supreme Court has observed with renewed vigor, the Eleventh Amendment "does not provide for federal jurisdiction over suits against nonconsenting States." *See, e.g., Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631, 640 (2000) (even ADEA does not abrogate state's Eleventh Amendment immunity). Here, Vermont's participation in the Medicaid program does not in itself constitute a waiver of Eleventh Amendment immunity. *See Yorktown Med. Lab., Inc. v. Perales*, 948 F.2d 84, 88 (2d Cir. 1991). In light of the Supreme Court's recent pronouncements, the plaintiff has not persuaded the Court that the State of Vermont is subject to this Court's jurisdiction under these circumstances.

Moreover, the fact that plaintiff has framed his complaint in terms of declaratory and injunctive relief is of no import.

The ultimate relief the plaintiff seeks is to receive monetary compensation arising from injuries caused by tobacco. This money is to come from the State treasury. "When state funds are awarded to compensate for past wrongdoing by state officials, or to deter future wrongdoing, the Eleventh Amendment bars the payment as retrospective." *Kostok v. Thomas*, 105 F.3d 65, 69 (2d Cir. 1997).

The complaint is DISMISSED.

SO ORDERED.

Dated at Brattleboro, Vermont, this 21st day of June, 2000.

/s/ _____
J. Garvan Murtha
Chief Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Civil Action No. 1:00-CV-39

LAWRENCE TYLER, on behalf of himself and all others similarly situated,

Plaintiffs,

- against -

JAMES H. HOUGLAS, Tobacco Settlement Escrow Agent, WILLIAM H. SORRELL, Attorney General of Vermont, EILEEN ELLIOTT, Commissioner, Vermont Department of Social Welfare, and LORI COLLINS, Third Party Liability Supervisor, Vermont Department of Social Welfare, in their official capacities,

Defendants.

COMPLAINT—CLASS ACTION

Nature of the Lawsuit

1. This action is brought by and on behalf of the state's most powerless citizens—poor people who have suffered death, disease and debilitation from tobacco use and who are dependent upon the state's Medicaid program to help pay for their medical care.

2. The State of Vermont received hundreds of millions of dollars in federal funds by virtue of its participation in the Medicaid program *and* its concomitant agreement to comply with the Medicaid Act and attendant federal regulations.

3. Specifically, the State of Vermont must comply with those provisions of the Medicaid Act mandating (a) the

recovery of medical assistance payments from third parties who are responsible for causing Medicaid recipients' sickness, injury and death, and (b) the disbursement of a portion of funds collected from those responsible third parties to injured Medicaid recipients, such as the plaintiffs.

4. This case arises out of the State of Vermont's settlement of litigation with manufacturers of tobacco products. On May 29, 1997, the State filed *State of Vermont v. Philip Morris Inc., et al.*, in Chittenden County Superior Court, alleging public health and consumer fraud violations. On April 23, 1998, the Governor signed *the Tobacco Medicaid Reimbursement Act* into law, authorizing legal action against tobacco manufacturers for the recovery of Medicaid expenditures for tobacco-related illnesses. On July 7, 1998, the State of Vermont filed a second state lawsuit against tobacco manufacturers, seeking reimbursement of state Medicaid expenditures. In the course of the above litigation, in numerous pleadings filed with the courts and in countless public pronouncements, state officials including defendant Attorney General William Sorrell identified the tobacco-company defendants as third parties legally liable for causing Medicaid recipients' sickness, injury and death.

5. Once the state identified the tobacco companies as responsible third parties within the meaning of the Medicaid Act, federal law compelled the state to seek from those companies reimbursement of all monies paid through the state Medicaid program on behalf of persons injured by tobacco use.

6. Indeed, Vermont's July 1998 Complaint against the tobacco companies alleged "[t]he State spends millions of dollars each year to provide or pay for health care and other necessary facilities and services on behalf of low-income Vermonters . . . which were caused by the unlawful actions of the Tobacco companies." (Complaint at p. 71). Vermont explicitly sought reimbursement of the money the state spent

or will spend providing Medicaid benefits for treatment of tobacco-related illnesses. (Complaint at pp. 74-78). In addition to its Complaint, numerous other pleadings and official statements made by state officials, including defendant Attorney General Sorrell, in the course of the state's lawsuit against the tobacco companies reveal that the central element of damages claimed by the state was the cost of medical payments made through the state's Medicaid program to pay for smoking-related injuries caused by the tobacco companies.

7. On November 23, 1998, the state settled its litigation with the tobacco companies pursuant to a Master Settlement Agreement, whereby the state agreed to dismiss the suit and forever release and discharge the tobacco defendants in exchange for cash payments in an amount in excess of $805.6 million, the bulk of which is to be paid to the state in annual payments over the next 25 years. The state court approved the settlement with the tobacco companies on December 13, 1998. The state has received its first payment of approximately $9.9 million, and its second payment of $26.3 million is due.

8. Notwithstanding the fact that the state's July 1998 lawsuit against the tobacco companies explicitly sought to recover monies paid through the state's Medicaid program, and Attorney General Sorrell's October 27, 1999 press release that the amounts paid under the Master Settlement Agreement were "recovered funds," the state is apparently claiming that its lawsuit was not a Medicaid recovery action as compelled by the Medicaid Act, and that it is therefore not required to disburse the settlement proceeds according to the requirements of federal law. The state has taken no steps to disburse to the plaintiffs any portion of the settlement amount or to inform the plaintiffs of their rights to claim that portion of the settlement monies to which they are legally entitled.

9. If the state claims its suit against the tobacco companies was not a Medicaid recovery action, then, even in the face of its own repeated acknowledgement that the tobacco companies are third parties responsible for Medicaid recipients' injuries and death, the state has violated federal law by failing to bring an action for the recovery of medical payments from the tobacco companies as compelled by the Medicaid Act and its regulations.

10. If the state's lawsuit against the tobacco companies for the recovery of hundreds of millions of dollars in medical payments was, as it clearly appears, a recovery action compelled by the Medicaid Act, then the state has violated federal which requires that the state to disburse a portion of the settlement monies directly to the plaintiffs. 42 U.S.C. § 1396k ("[s]uch part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected *shall* be paid to such individual.")

11. Whether the state is violating the Medicaid Act by failing to seek the recovery of medical assistance payments from the tobacco companies or it is violating the Medicaid Act by failing to distribute to the plaintiffs a part of the settlement monies it has already recovered from those companies, the state has illegally deprived and continues to deprive the plaintiffs of their rights and their property in violation of federal law and the United States Constitution.

12. Defendants' failure to comply with federal law not only deprives plaintiffs of rights and property secured by federal law and the Constitution, but further threatens the state's entitlement to federal Medicaid funds, endangers the

plaintiffs' continued receipt of medical assistance benefits, and jeopardizes the health and well-being of tens of thousands of Vermont's poorest citizens, including the plaintiffs. This complaint for declaratory and injunctive relief seeks to compel the state officials to comply with their duties under federal law.

Jurisdiction and Venue

13. This action is brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201. Jurisdiction is based upon 28 U.S.C. §§ 1331 and 1343.

14. Venue is based upon 28 U.S.C. § 1391(b)(2). A substantial part of the events or omissions giving rise to the claims herein arose, and a substantial part of the property that is the subject of the action is located, in the District of Vermont.

Parties

15. Plaintiff Lawrence Tyler is a citizen of the State of Vermont who has smoked tobacco for over 40 years and who suffers from chronic obstructive pulmonary disease (COPD) and emphysema, and has been a recipient of medical assistance benefits for the condition through Vermont's Medicaid program since at least 1996.

16. Defendant James H. Douglas is the escrow agent designated by the parties to the tobacco litigation Master Settlement Agreement to receive, manage and disburse the settlement monies to be paid by the tobacco company defendants to the state. James H. Douglas, in his capacity as the designated escrow agent, is an agent and representative of the State of Vermont acting under color of law. Defendant Douglas is sued in his official capacity.

17. Defendant William H. Sorrell is the Attorney General of the State of Vermont and was responsible for prosecuting and settling the tobacco litigation on behalf of the state. Defendant Sorrell is sued in his official capacity as the Attorney General of the State of Vermont.

18. Defendant Eileen Elliot is the Commissioner, Department of Social Welfare, Agency of Human Services, for the State of Vermont, and is responsible for establishing policies and practices of the Department, and for implementing those policies and practices, including policies and practices for the recovery and disbursement of money paid through the Vermont Medicaid program. Defendant Elliot is sued in her official capacity as the Commissioner, Vermont Department of Social Welfare.

19. Defendant Lori Collins is the Third Party Liability Supervisor in the Vermont Department of Social Welfare. As such, she is in charge of the Department's Third Party Recovery Unit which is responsible for enforcing the recovery policies and practices at issue in this action. Defendant Collins is sued in her official capacity as the Third Party Liability Supervisor, Vermont Department of Social Welfare.

20. At all times relevant to this Complaint, defendants were acting under color of law.

Class Action Allegations

21. This action is maintainable as a class action under Federal Rule of Civil Procedure 20, paragraphs (a), (b)(1)(A) and (b)(2).

22. Plaintiff Tyler brings this action on behalf of himself and all other persons who have received medical assistance through the State of Vermont's Medicaid program for tobacco-related diseases or injuries, or who are the heirs or guardians of such Medicaid recipients.

23. The class is so numerous that joinder of all members is impracticable, as there are many hundreds and even thousands of persons who are members of the proposed class.

24. Plaintiff Tyler has smoked tobacco cigarettes for over 40 years, suffers from chronic and severe lung disease, and

has received, and continues to receive, and will receive in the future medical assistance for care and treatment of his lung disease through Vermont's Medicaid program.

25. There are questions of law and fact common to the class, the claims of the named plaintiff is typical of the claims of the class, and the named plaintiff will fairly and adequately represent the interests of the class.

26. The prosecution of separate actions by individual members of the class would create the risk of inconsistent adjudications, which would establish incompatible standards of conduct for defendants.

27. The defendants have acted or refused to act on grounds generally applicable to all members of the proposed class, thereby making declaratory and injunctive relied appropriate with respect to the class as a whole.

The Medicaid Program

28. Medicaid is a federal program of medical assistance to eligible low-income persons administered by the states under a cooperative federal-state funding scheme. Although states are not required to participate in Medicaid, if a state chooses to do so it must conform to federal Medicaid law.

29. Vermont participates in the Medicaid program. Vermont's program of medical assistance to low-income persons is codified at 33 V.S.A. §§ 1901-1911.

30. In order to participate in the Medicaid program, and as a condition for the receipt of federal funds, Vermont was required to submit to the United States Department of Health and Human Services, Health Care Financing Administration (HCFA), a comprehensive written statement called a State Plan describing the nature and scope of its Medicaid program and giving assurance that the program will be administered in conformity with the requirements of the Medicaid Act and all applicable federal regulations.

31. Vermont's current State Plan was submitted to HCFA on behalf of the State of Vermont by Gretchen Morse, Secretary, Agency of Human Resources, on January 25, 1998, with various amendments submitted since. HCFA has approved the State Plan, and the State has received hundreds and hundreds of millions of dollars in federal Medicaid funds in exchange for the State's commitment to abide by the Plan and to administer its program in compliance with federal law.

Medicaid Third-Party Recovery and Disbursement Requirements

32. The Medicaid Act, at 42 U.S.C. § 1396a(25)(A) and (B), requires each state in its State Plan to agree (a) "to take all reasonable measures to ascertain the legal liability of third parties ... to pay for care and services under the plan," and (b) "in any case where legal liability is found to exist after medical assistance has been made available . . . [to] seek reimbursement for such assistance to the extent of such legal liability."

33. The Act's implementing regulations, at 42 C.F.R. § 433.138(a), provide that the state "*must* take reasonable measures to determine the legal liability of third parties who are liable to pay for services furnished under the plan."

34. To effectuate recovery from responsible third parties, 42 U.S.C. § 1396a(45) requires that each State Plan must "provide for mandatory assignment of rights of payment for medical support and other medical care owed to recipients."

35. In Vermont, "[t]o the extent that payment for covered expenses has been made under the state Medicaid program or through any state agency administering health benefits or a health benefit plan for which Medicaid is a source of funding for health care items or services furnished to an individual, in any case where a third party has a legal liability to make

payments, the state is considered to have acquired the rights of the individual to payment by any other party for those health care items or services." 33 V.S.A. § 1907.

36. The Medicaid Act and its regulations also set forth specific mandatory rules governing the state's disbursement of amounts recovered from responsible third parties.

37. Title 42 U.S.C. § 1396k provides that "[s]uch part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected *shall* be paid to such individual."

38. Title 42 Code of Federal Regulations § 433.154 similarly mandates that the state "*must* distribute" to the individual Medicaid recipients all amounts recovered from responsible third parties in excess of what is required to reimburse the state and federal Medicaid programs for medical payments made on behalf of those recipients.

39. As explained by HCFA in its official commentary published in the Federal Register at the time that § 433.154 was codified, the Medicaid Act "specifically requires that any overage be paid to the individual, who is usually a person of limited resources." This federally-mandated distribution requirement ensures that both the state and federal government are made whole, with the balance of any recovery going to the injured party.

40. Federal regulations, at 42 C.F.R. § 433.151, require that Vermont's State Plan "must provide that the requirements . . . for distributing third party collection specified in [section] 433.154 are met."

41. In its State Plan, the State of Vermont promises HCFA that it "meets all requirements of" 42 C.F.R. § 433.154.

42. If Vermont fails to comply with the third-party recovery provisions of the Medicaid Act, it will lose its entitlement to federal Medicaid funds (42 C.F.R. § 433.140(a)(1)), thereby endangering all Medicaid recipients' continued receipt of medical assistance benefits and jeopardizing the health and well-being of tens of thousands of Vermont's poorest citizens, including the plaintiffs.

The State's Failure to Comply with Federal Law

43. The defendants know and for some time have known that manufacturers of tobacco products and certain other tobacco-related organizations are third parties legally liable, within the meaning of the Medicaid Act, for medical assistance payments made through the Vermont Medicaid program.

44. This knowledge led to the commencement of the July 7, 1998 lawsuit against eight manufacturers of tobacco products and other tobacco industry defendants, asserting that the defendants' misconduct injured the state by increasing the costs of health care benefits paid by the state through its Medicaid program.

45. The state's Complaint alleged, among other things, that: "[t]he State of Vermont spends millions of dollars each year to provide or pay for health care and other necessary facilities and services on behalf of low-income Vermonters;" "[i]n fulfilling its statutory duties, the State of Vermont has expended and will expend substantial sums of money due to the increased cost of providing health care services for treatment of tobacco-caused diseases;" "[a]s a result of their tobacco-related injuries, many of these [Vermonters] have received or will receive Medicaid benefits from the State of Vermont, for which the State seeks reimbursement;" and "[b]ecause the taxpayers of the State of Vermont should not bear the costs of treating tobacco-related illnesses when the

tobacco companies were negligent, the Attorney General brings this claim to recoup those funds and protect the public fisc."

46. In its Complaint, the state sought to recover Medicaid benefits the state has paid or will pay for medical assistance provided under Vermont's Medicaid program pursuant to 33 V.S.A. §§ 1901-1911. The state asserted various counts against the tobacco defendants, but the consistent central element of actual damages was reimbursement and recovery of these past and future health care expenditures made by the state under its Medicaid plan. Moreover, the Master Settlement Agreement expressly declares that no settlement payments are made "in settlement of an actual or potential liability for a fine, penalty (civil or criminal) or enhanced damages or . . . the cost of a tangible or intangible asset or other future benefit."

47. Moreover, public statements made by defendant Attorney General Sorrell during the course of the tobacco litigation reveal that the purpose of the state's July 1998 lawsuit against the Tobacco companies was to recover funds paid through the state Medicaid program, and that the lawsuit and the amounts actually paid under the Master Settlement Agreement were "recovery funds."

48. One such example is the Attorney General Sorrell's November 20, 1998, press release entitled "VERMONT ATTORNEY GENERAL ANNOUNCES TOBACCO SETTLEMENT," in which he states that Vermont "stands to recover approximately eight hundred million dollars over the next twenty-five years," followed by the assertion that "[e]xperts have calculated that Vermont's annual Medicaid expenditures to treat tobacco-caused illnesses are approximately thirty million dollars."

49. Another example is Attorney General Sorrell's October 27, 1999 press release entitled "ATTORNEY GENERAL WILLIAM H. SORRELL CONFIRMS FINAL APPROVAL

OF THE TOBACCO SETTLEMENT; $9.8 MILLION TO FLOW TO VERMONT NOW, WITH $26.3 MILLION STARTING JANUARY 2000," in which he states that the settlement imposed bans on tobacco advertising, stopped the tobacco companies from targeting children, allocated funding for tobacco education efforts, and *paid the states a total of $206 billion in recovery funds*." (emphasis added).

50. In addition to the proportionate recovery of its Medicaid expenditures, the only additional funds the State of Vermont received in its settlement, as announced by Attorney General Sorrell, was due to its contributions to the original lawsuits and the negotiations.

51. Pursuant to the specific terms of the Master Settlement Agreement and Vermont's release of the tobacco companies, Vermont has forever waived its rights to litigate any theories of Medicaid recovery against the tobacco companies or to seek from the tobacco companies any reimbursement of Medicaid payments made on behalf of injured smokers, as assignee of the plaintiffs' claims or otherwise.

52. The parties to the Master Settlement Agreement, including the State of Vermont and defendant Attorney General Sorrell, took pains to avoid characterizing any portion of the settlement as attributable to Medicaid costs, even though Vermont's Complaint explicitly sought to recover Medicaid expenditures, and even though distribution of the settlement proceeds under the Master Settlement Agreement mirrors each state's proportionate share of tobacco-related Medicaid expenditures. It has been admitted by various state governors and by the National Governors Association, for example, that "[o]ur states' Attorneys General carefully crafted the tobacco agreement to reflect only state costs."

53. The states were motivated to "carefully craft" the Master Settlement Agreement in this way so that they could

attempt to avoid their legal obligations to disburse a portion of the recovery to the federal government, as required by the Medicaid Act.

54. It is a matter of public record, for example, that one of the "top priorities" of the National Governor's Association was to "develop a strategy aimed at preventing the federal government's seizure of state tobacco settlement funds," and that the states, including Vermont, were extremely concerned about "the amount that could be lost because of HCFA recoupment of federal Medicaid expenditures."

55. In May 1999, as a result of the states' lobbying efforts to avoid paying any of the tobacco settlement monies to HCFA, Congress amended the Medicaid Act, 42 U.S.C. § 1396b(d), to add language waiving the federal government's entitlement to its portion of the settlement proceeds. This legislation was described by the National Governor's Association as the Governors' "number one legislative priority."

56. The amendment to section 1396b(d), however, does not alter the state's legal obligation to disburse to the plaintiffs that portion of the settlement monies that exceeds the state's Medicaid costs. Congress did not alter or amend any section the Medicaid Act affecting the state's disbursement obligation to Medicaid recipients.

57. The $805.6 million that Vermont is poised to receive from the tobacco companies exceeds even the most generous estimates of what the state has actually paid, or might in the future pay, on behalf of Medicaid recipients in this state who have suffered tobacco-related injuries.

58. This excess recovery belongs to the plaintiffs, and by law should be disbursed to them.

First Claim for Relief
(Declaratory Judgment, 28 U.S.C. § 2201)

59. Plaintiffs reallege and incorporate herein by reference each and every allegation of paragraphs 1 through 58.

60. There is an actual controversy between the parties. Plaintiffs contend that the defendants have failed to comply with the third-party recovery provisions of the Medicaid Act and regulations, including those provisions that govern the disbursement of recovered funds to the plaintiffs. Defendants contend that they have complied with federal law.

61. Plaintiff, and all members of the plaintiff class, have suffered, and are threatened with suffering irreparable injury.

62. Plaintiff, and all members of the plaintiff class, have no adequate remedy at law to redress the violations of law alleged herein.

63. The plaintiffs are entitled to a declaration of their rights and the defendants' obligations with respect to the integrity of Vermont's Medicaid program insofar as the defendants' failure to comply with federal law imperils its continued receipt of federal funds and endangers the public assistance program upon which plaintiffs rely to maintain their health and well-being.

64. The plaintiffs are also entitled to a declaration of their rights and the defendants' obligations with respect to the provisions of the Medicaid Act governing the recovery of medical assistance payments from responsible third parties, such as the tobacco companies, and the proper disbursement of amounts recovered.

Second Claim for Relief
(Deprivation of Property without Due Process)

65. Plaintiffs reallege and incorporate herein by reference each and every allegation of paragraphs 1 through 64.

66. The defendants have deprived plaintiffs of their property without notice, hearing, and other due process required by the Fourteenth Amendment to the United States Constitution.

67. Among other things, the defendants have deprived plaintiffs of: (a) that portion of the tobacco litigation settlement that rightly belongs to the plaintiffs by virtue of the requirements of the Medicaid Act and federal regulations; (b) the plaintiffs' property interest in their claims—or causes of action—for payment of that portion of the tobacco litigation settlement that rightly belongs to them by virtue of the requirements of the Medicaid Act and federal regulations, and (c) the value of the rights assigned by the plaintiffs to the state as a condition of Medicaid eligibility, which value includes, but is not limited to, all amounts recovered by the state in excess of its tobacco-related Medicaid expenditures by virtue of such assignments.

Third Claim for Relief
(Taking of Property Without Just Compensation)

68. Plaintiffs reallege and incorporate herein by reference each and every allegation of paragraph 1 through 67.

69. The defendants have taken the plaintiffs' property without just compensation in violation of the Fifth and Fourteenth amendment to the United States Constitution.

70. Among other things, the defendants have deprived plaintiffs of: (a) that portion of the tobacco litigation settlement that rightly belongs to the plaintiffs by virtue of the requirements of the Medicaid Act and federal regulations; (b) the plaintiffs' property interest in their claims—or causes of action—for payment of that portion of the tobacco litigation settlement that rightly belongs to them by virtue of the requirements of the Medicaid Act and federal regulations, and (c) the value of the rights assigned by the plaintiffs to the state as a condition of Medicaid eligibility, which value

includes, but is not limited to, all amounts recovered by the state in excess of its tobacco-related Medicaid expenditures by virtue of such assignment.

71. The defendants' decision to take plaintiffs' property—expressed in, among other things, the tobacco litigation Master Settlement Agreement and public statements made by Vermont State officials including Attorney General Sorrell—is a final decision.

72. The Master Settlement Agreement having become final, and the state's tobacco lawsuit having been dismissed with prejudice, no available state procedures or adequate state process exists for the plaintiffs to seek just compensation.

Fourth Claim for Relief
(Violation of the Medicaid Act's
Disbursement Requirements)

73. Plaintiffs reallege and incorporate herein by reference each and every allegation of paragraphs 1 through 72.

74. The defendants have violated and are violating federal law by failing to disburse properly funds that have been recovered from legally responsible tobacco companies, as compelled by the Medicaid Act and governing federal regulations.

Fifth Claim for Relief
(Violation of the Medicaid Act's Recovery Requirements)

75. Plaintiffs reallege and incorporate herein by reference each and every allegation of paragraphs 1 through 74.

76. The Defendants have violated and are violating federal law by failing to seek reimbursement of medical assistance payments made through the state Medicaid program from known legally responsible tobacco companies, pursuant to the requirements of the Medicaid Act and governing federal regulations.

Prayer for Relief

WHEREFORE, plaintiffs pray for judgment as follows:

1. For an order certifying the class;

2. For an order declaring that the defendants are compelled by the Medicaid Act and federal regulations: (a) to seek reimbursement of medical assistance made through the state Medicaid program from known legally liable third-parties such as those tobacco companies already identified by the state; and (b) to disburse all amounts recovered in such third-party reimbursement actions according to the requirements of the Medicaid Act;

3. For preliminary and permanent injunctions enjoining the defendants, their successors, agents, employees, and all persons working in concert or participation with them, to disburse to the plaintiffs, or to cause the disbursement to the plaintiffs, that portion of the tobacco litigation settlement proceeds that belong to the plaintiffs, before such proceeds are deposited in the state treasury or are otherwise in the possession, custody or control of the state;

4. For preliminary and permanent injunction enjoining the defendants, their successors, agents, employees, and all persons working in concert or participation with them, to return to the plaintiffs any and all property taken from them, including but not limited to: (a) that portion of the tobacco litigation settlement that rightly belongs to the plaintiffs by virtue of the requirements of the Medicaid Act and federal regulations; (b) the plaintiffs' property interest in their claims—or causes of action—for payment of that portion of the tobacco litigation settlement that rightly belongs to them by virtue of the requirements of the Medicaid Act and federal regulations; and (c) the value of the rights assigned by the plaintiffs to the state, as a condition of Medicaid eligibility, to the full value of all amounts recovered by the state in excess

of its tobacco-related Medicaid expenditures by virtue of such assignments, or to provide just compensation to the plaintiffs to the full value of the property taken;

5. For preliminary and permanent injunctions enjoining the defendants, their successors, agents, employees, and all persons working in concert or participation with them, to provide each and every member of the plaintiff class due process of law concerning any and all property previously taken from the plaintiffs, including, but not limited to, (a) notice, (b) information and documents sufficient to apprise each plaintiff of the total amount expended by the Medicaid program on the individual's behalf and the proportionate amount of the tobacco settlement attributable to the Medicaid costs paid by the state on that individual's behalf; and (c) a post-deprivation hearing at which the individual shall be afforded the opportunity to object to the deprivation, to seek return of the property previously taken, and to seek just compensation or other redress;

6. For preliminary and permanent injunctions enjoining the defendants, their successors, agents, employees, and all persons working in concert or participation with them, to provide to each and every member of the plaintiff class due process of law concerning any and all property to be taken from the plaintiffs in the future, including (a) notice, (b) information and documents sufficient to apprise each member of the plaintiff class of the total amount expended by the state Medicaid program on the individual's behalf and the proportionate amount of the tobacco settlement attributable to the Medicaid costs paid by the state on that individual's behalf; and (c) a pre-deprivation hearing at which the individual shall be afforded the opportunity to object tot eh deprivation and to seek just compensation or other redress;

7. For preliminary and permanent injunctions enjoining defendants, their successors, agents, employees, and all persons working in concert or participation with them, to take

all steps necessary to maintain all monies previously collected and all monies to be collected as a result of its settlement with tobacco companies, so that those settlement monies are not deposited in the state treasury and will be available for proper accounting and disbursement according to the requirements of the Medicaid Act, other federal laws, the Constitution of the United States, and any and all order of this Court;

8. For preliminary and permanent injunctions enjoining defendants, their successors, agents, employees, and all persons working in concert or participation with them, to take all steps necessary to retain all amounts collected by the state as a result of its settlement with the tobacco companies, and to notify each and every member of the plaintiff class of the state law procedures whereby the plaintiffs may obtain their federally mandated portion of the amounts recovered.

9. For preliminary and permanent injunctions enjoining defendants, their successors, agents, employees, and all persons working in concert or participation with them, to seek reimbursement of medical assistance payments made through the State Medicaid program from tobacco companies and other known legally liable third-parties according to the requirements of the Medicaid Act;

10. For costs and reasonable attorneys fees pursuant to 42 U.S.C. § 1988; and

11. For such further relief as the court deems just and proper.

Dated: January 26, 2000

/s/ _____

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APPENDIX E

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein

shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX F

42 U.S.C. § 1396k

§ 1396k.—Assignment, enforcement, and collection of rights of payments for medical care; establishment of procedures pursuant to State plan; amounts retained by State

(a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this subchapter, a State plan for medical assistance shall—

(1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required—

(A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute an assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party;

(B) to cooperate with the State (i) in establishing the paternity of such person (referred to in sub-paragraph (A)) if the person is a child born out of wedlock, and (ii) in obtaining support and payments (described in subparagraph (A)) for himself and for such person, unless (in either case) the individual is described in section 1396a(l)(1)(A) of this title or the individual is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved; and

(C) to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan, unless such individual has good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved; and

(2) provide for entering into cooperative arrangements (including financial arrangements), with any appropriate agency of any State (including, with respect to the enforcement and collection of rights of payment for medical care by or through a parent, with a State's agency established or designated under section 654(3) of this title) and with appropriate courts and law enforcement officials, to assist the agency or agencies administering the State plan with respect to (A) the enforcement and collection of rights to support or payment assigned under this section and (B) any other matters of common concern.

(b) Such part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual.

42 U.S.C. § 1396b(d)

§ 1396b. Payments to States

(d) Estimates of State entitlement; installments; adjustments to reflect overpayments of underpayments; time for recovery or adjustment; uncollectable or discharged debts; obligated appropriations; disputed claims

(1) Prior to the beginning of each quarter, the Secretary shall estimate the amount to which a State will be entitled under subsections (a) and (b) of this section for such quarter, such estimates to be based on (A) a report filed by the State containing its estimate of the total sum to be expended in such quarter in accordance with the provisions of such subsections, and stating the amount appropriated or made available by the State and its political subdivisions for such expenditures in such quarter, and if such amount is less than the State's proportionate share of the total sum of such estimated expenditures, the source or sources from which the difference is expected to be derived, and (B) such other investigation as the Secretary may find necessary.

(2)(A) The Secretary shall then pay to the State, in such installments as he may determine, the amount so estimated, reduced or increased to the extent of any overpayment or underpayment which the Secretary determines was made under this section to such State for any prior quarter and with respect to which adjustment has not already been made under this subsection.

(B) Expenditures for which payments were made to the State under subsection (a) of this section shall be treated as an overpayment to the extent that the State or local agency administering such plan has been reimbursed for such expenditures by a third party pursuant to the provisions of its plan in compliance with section 1396a(a)(25) of this title.

(C) For purposes of this subsection, when an overpayment is discovered, which was made by a State to a person or other entity, the State shall have a period of 60 days in which to recover or attempt to recover such overpayment before adjustment is made in the Federal payment to such State on account of such overpayment. Except as otherwise provided in subparagraph (D), the adjustment in the Federal payment shall be made at the end of the 60 days, whether or not recovery was made.

(D) In any case where the State is unable to recover a debt which represents an overpayment (or any portion thereof) made to a person or other entity on account of such debt having been discharged in bankruptcy or otherwise being uncollectable, no adjustment shall be made in the Federal payment to such State on account of such overpayment (or portion thereof).

(3)(A) The pro rata share to which the United States is equitably entitled, as determined by the Secretary, of the net amount recovered during any quarter by the State or any political subdivision thereof with respect to medical assistance furnished under the State plan shall be considered an overpayment to be adjusted under this subsection.

(B)(i) Subparagraph (A) and paragraph (2)(B) shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products, as defined in section 5702(d) of the Internal Revenue Code of 1986, and State Attorneys General, or as part of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.

(ii) Except as provided in subsection (i)(19) of this section, a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a

judgment, described in clause (i) for any expenditures determined appropriate by the State.

(4) Upon the making of any estimate by the Secretary under this subsection, any appropriations available for payments under this section shall be deemed obligated.

(5) In any case in which the Secretary estimates that there has been an overpayment under this section to a State on the basis of a claim by such State that has been disallowed by the Secretary under section 1316(d) of this title, and such State disputes such disallowance, the amount of the Federal payment in controversy shall, at the option of the State, be retained by such State or recovered by the Secretary pending a final determination with respect to such payment amount. If such final determination is to the effect that any amount was properly disallowed, and the State chose to retain payment of the amount in controversy, the Secretary shall offset, from any subsequent payments made to such State under this subchapter, an amount equal to the proper amount of the disallowance plus interest on such amount disallowed for the period beginning on the date such amount was disallowed and ending on the date of such final determination at a rate (determined by the Secretary) based on the average of the bond equivalent of the weekly 90-day treasury bill auction rates during such period.

(6)(A) Each State (as defined in subsection (w)(7)(D) of this section) shall include, in the first report submitted under paragraph (1) after the end of each fiscal year, information related to–

(i) provider-related donations made to the State or units of local government during such fiscal year, and

(ii) health care related taxes collected by the State or such units during such fiscal year.

(B) Each State shall include, in the first report submitted under paragraph (1) after the end of each fiscal year, information related to the total amount of payment adjustments made, and the amount of payment adjustments made to individual providers (by provider), under section 1396r-4(c) of this title during such fiscal year.

42 U.S.C. § 1983

§ 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 C.F.R. § 433.154

Title 42—Public Health
Chapter IV—Centers for Medicare & Medicaid Services,
Department of Health and Human Services

Part 433—State Fiscal Administration
Subpart D—Third Party Liability

Sec. 433.154. Distribution of collections.

The agency must distribute collections as follows—

(a) To itself, an amount equal to State Medicaid expenditures for the individual on whose right the collection was based.

(b) To the Federal Government, the Federal share of the State Medicaid expenditures, minus any incentive payment made in accordance with Sec. 433.153.

(c) To the recipient, any remaining amount. This amount must be treated as income or resources under part 435 or part 436 of this subchapter, as appropriate.